COMMENTARIES

ON THE

Laws of England.

BOOK THE SECOND.

BY

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ONE OF THE JUSTICES OF HIS MAJESTY'S
COURT OF COMMON PLEAS.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER THE FIRST.

OF PROPERTY, IN GENERAL.

THE former book of these commentaries having treated at large of the *jura personarum*, or such rights and duties as are annexed to the persons of men, the objects of our inquiry in this second book will be the *jura rerum*, or, those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law stile the rights of dominion, or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider it's several objects.

THERE is nothing which ſo generally ſtrikes the imagination, and engages the affections of mankind, as the right of property; or that ſole and deſpotic dominion which one man claims and exerciſes over the external things of the world, in total excluſion of the right of any other individual in the univerſe. And yet there are very few, that will give themſelves the trouble to conſider the original and foundation of this right. Pleaſed as we are with the poſſeſſion, we ſeem afraid to look back to the means by which it was acquired, as if fearful of ſome defect in our title; or at beſt we reſt ſatisfied with the deciſion of the laws in our favour, without examining the reaſon or authority upon which thoſe laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by deſcent from our anceſtors, or by the laſt will and teſtament of the dying owner; not caring to reflect that (accurately and ſtrictly ſpeaking) there is no foundation in nature or in natural law, why a ſet of words upon parchment ſhould convey the dominion of land; why the ſon ſhould have a right to exclude his fellow-creatures from a determinate ſpot of ground, becauſe his father had done ſo before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain poſſeſſion, ſhould be entitled to tell the reſt of the world which of them ſhould enjoy it after him. Theſe inquiries, it muſt be owned, would be uſeleſs and even troubleſome in common life. It is well if the maſs of mankind will obey the laws when made, without ſcrutinizing too nicely into the reaſons of making them. But, when law is to be conſidered not only as matter of practice, but alſo as a rational ſcience, it cannot be improper or uſeleſs to examine more deeply the rudiments and grounds of theſe poſitive conſtitutions of ſociety.

IN the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to man "dominion over "all the earth; and over the fiſh of the ſea, and over the "fowl of the air, and over every living thing that moveth "upon the earth[a]." This is the only true and ſolid foun-

[a] Gen. i. 28.

dation

dation of man's dominion over external things, whatever airy metaphyſical notions may have been ſtarted by fanciful writers upon this ſubject. The earth therefore, and all things therein, are the general property of all mankind, excluſive of other beings, from the immediate gift of the creator. And, while the earth continued bare of inhabitants, it is reaſonable to ſuppoſe, that all was in common among them, and that every one took from the public ſtock to his own uſe ſuch things as his immediate neceſſities required.

THESE general notions of property were then ſufficient to anſwer all the purpoſes of human life; and might perhaps ſtill have anſwered them had it been poſſible for mankind to have remained in a ſtate of primeval ſimplicity: as may be collected from the manners of many American nations when firſt diſcovered by the Europeans; and from the antient method of living among the firſt Europeans themſelves, if we may credit either the memorials of them preſerved in the golden age of the poets, or the uniform accounts given by hiſtorians of thoſe times, wherein "*erant omnia communia et indiviſa* "*omnibus, veluti unum cunctis patrimonium eſſet* [b]." Not that this communion of goods ſeems ever to have been applicable, even in the earlieſt ages, to ought but the *ſubſtance* of the thing; nor could it be extended to the *uſe* of it. For, by the law of nature and reaſon, he, who firſt began to uſe it, acquired therein a kind of tranſient property, that laſted ſo long as he was uſing it, and no longer [c]: or, to ſpeak with greater preciſion, the *right* of poſſeſſion continued for the ſame time only that the *act* of poſſeſſion laſted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined ſpot of it, for reſt, for ſhade, or the like, acquired for the time a ſort of ownerſhip, from which it would have been unjuſt, and contrary to the law of nature, to have driven him by force; but the inſtant that he quitted the uſe or occupation of it, another might ſeiſe it

[b] Juſtin. l. 43. c. 1.

[c] Barbeyr. Puff. l. 4. c. 4.

without injuſtice. Thus alſo a vine or other tree might be ſaid to be in common, as all men were equally entitled to it's produce; and yet any private individual might gain the ſole property of the fruit, which he had gathered for his own repaſt. A doctrine well illuſtrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own [d].

BUT when mankind increaſed in number, craft, and ambition, it became neceſſary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *uſe* only, but the very *ſubſtance* of the thing to be uſed. Otherwiſe innumerable tumults muſt have ariſen, and the good order of the world be continually broken and diſturbed, while a variety of perſons were ſtriving who ſhould get the firſt occupation of the ſame thing, or diſputing which of them had actually gained it. As human life alſo grew more and more refined, abundance of conveniences were deviſed to render it more eaſy, commodious, and agreeable; as, habitations for ſhelter and ſafety, and raiment for warmth and decency. But no man would be at the trouble to provide either, ſo long as he had only an uſufructuary property in them, which was to ceaſe the inſtant that he quitted poſſeſſion;—if, as ſoon as he walked out of his tent, or pulled off his garment, the next ſtranger who came by would have a right to inhabit the one, and to wear the other. In the caſe of habitations in particular, it was natural to obſerve, that even the brute creation, to whom every thing elſe was in common, maintained a kind of permanent property in their dwellings, eſpecially for the protection of their young; that the birds of the air had neſts, and the beaſts of the field had caverns, the invaſion of which they eſteemed a very flagrant injuſtice, and would ſacrifice their lives to preſerve them. Hence a property was ſoon eſtabliſhed in every man's houſe and home-ſtall; which ſeem to have been originally mere temporary huts or moveable cabins, ſuited to the deſign of

d *Quemadmodum theatrum, cum commune ſit, recte tamen dici poteſt, ejus eſſe eum locum quem quiſque occuparit.* De Fin. l. 3. c. 20.

 providence

providence for more ſpeedily peopling the earth, and ſuited to the wandering life of their owners, before any extenſive property in the ſoil or ground was eſtabliſhed. And there can be no doubt, but that moveables of every kind became ſooner appropriated than the permanent ſubſtantial ſoil: partly becauſe they were more ſuſceptible of a long occupancy, which might be continued for months together without any ſenſible interruption, and at length by uſage ripen into an eſtabliſhed right; but principally becauſe few of them could be fit for uſe, till improved and meliorated by the bodily labour of the occupant: which bodily labour, beſtowed upon any ſubject which before lay in common to all men, is univerſally allowed to give the faireſt and moſt reaſonable title to an excluſive property therein.

THE article of food was a more immediate call, and therefore a more early conſideration. Such, as were not contented with the ſpontaneous product of the earth, ſought for a more ſolid refreſhment in the fleſh of beaſts, which they obtained by hunting. But the frequent diſappointments, incident to that method of proviſion, induced them to gather together ſuch animals as were of a more tame and ſequacious nature; and to eſtabliſh a permanent property in their flocks and herds, in order to ſuſtain themſelves in a leſs precarious manner, partly by the milk of the dams, and partly by the fleſh of the young. The ſupport of theſe their cattle made the article of *water* alſo a very important point. And therefore the book of Geneſis (the moſt venerable monument of antiquity, conſidered merely with a view to hiſtory) will furniſh us with frequent inſtances of violent contentions concerning wells; the excluſive property of which appears to have been eſtabliſhed in the firſt digger or occupant, even in ſuch places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a ſojourner, aſſerting his right to a well in the county of Abimelech, and exacting an oath for his ſecurity, "becauſe he had digged that well[e]." And Iſaac, about ninety years afterwards, reclaimed this his father's

[e] Gen. xxi. 30.

property; and, after much contention with the Philiftines, was fuffered to enjoy it in peace [f].

ALL this while the foil and pafture of the earth remained ftill in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the neceffity of a fole and exclufive property in lands (for the fake of agriculture) was earlier felt, and therefore more readily complied with. Otherwife, when the multitude of men and cattle had confumed every convenience on one fpot of ground, it was deemed a natural right to feife upon and occupy fuch other lands as would more eafily fupply their neceffities. This practice is ftill retained among the wild and uncultivated nations that have never been formed into civil ftates, like the Tartars and others in the eaft; where the climate itfelf, and the boundlefs extent of their territory, confpire to retain them ftill in the fame favage ftate of vagrant liberty, which was univerfal in the earlieft ages; and which Tacitus informs us continued among the Germans till the decline of the Roman empire [g]. We have alfo a ftriking example of the fame kind in the hiftory of Abraham and his nephew Lot [h]. When their joint fubftance became fo great, that pafture and other conveniences grew fcarce, the natural confequence was that a ftrife arofe between their fervants; fo that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compofe: "let there be no ftrife, I pray "thee, between thee and me. Is not the whole land before "thee? Separate thyfelf, I pray thee, from me. If thou wilt "take the left hand, then I will go to the right; or if thou "depart to the right hand, then I will go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleafed, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, and beheld all "the plain of Jordan, that it was well watered every where, "even as the garden of the Lord. Then Lot chofe him all "the plain of Jordan, and journeyed eaft; and Abraham "dwelt in the land of Canaan."

[f] Gen. xxvi. 15. 18, *&c.*

[g] *Colunt difcreti et diverfi; ut fons, ut campus, ut nemus, placuit. De mor. Ger.* 16.

[h] Gen. c. xiii.

UPON

UPON the ſame principle was founded the right of migration, or ſending colonies to find out new habitations, when the mother-country was overcharged with inhabitants; which was practiſed as well by the Phoenicians and Greeks, as the Germans, Scythians, and other northern people. And, ſo long as it was confined to the ſtocking and cultivation of deſert uninhabited countries, it kept ſtrictly within the limits of the law of nature. But how far the ſeiſing on countries already peopled, and driving out or maſſacring the innocent and defenceleſs natives, merely becauſe they differed from their invaders in language, in religion, in cuſtoms, in government, or in colour; how far ſuch a conduct was conſonant to nature, to reaſon, or to chriſtianity, deſerved well to be conſidered by thoſe, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new ſpots to inhabit, without encroaching upon former occupants: and, by conſtantly occupying the ſame individual ſpot, the fruits of the earth were conſumed, and it's ſpontaneous produce deſtroyed, without any proviſion for a future ſupply or ſucceſſion. It therefore became neceſſary to purſue ſome regular method of providing a conſtant ſubſiſtence; and this neceſſity produced, or at leaſt promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and conſequence, introduced and eſtabliſhed the idea of a more permanent property in the ſoil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in ſufficient quantities, without the aſſiſtance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to ſeiſe upon and enjoy the product of his induſtry, art, and labour? Had not therefore a ſeparate property in lands, as well as moveables, been veſted in ſome individuals, the world muſt have continued a foreſt, and men have been mere animals of prey; which, according to ſome philoſophers, is the genuine ſtate of nature. Whereas now (ſo graciouſly has Providence interwoven

our duty and our happineſs together) the reſult of this very neceſſity has been the ennobling of the human ſpecies, by giving it opportunities of improving it's *rational* faculties, as well as of exerting it's *natural*. Neceſſity begat property: and, in order to inſure that property, recourſe was had to civil ſociety, which brought along with it a long train of inſeparable concomitants; ſtates, government, laws, puniſhments, and the public exerciſe of religious duties. Thus connected together, it was found that a part only of ſociety was ſufficient to provide, by their manual labour, for the neceſſary ſubſiſtence of all; and leiſure was given to others to cultivate the human mind, to invent uſeful arts, and to lay the foundations of ſcience.

THE only queſtion remaining is, how this property became actually veſted: or what it is that gave a man an excluſive right to retain in a permanent manner that ſpecific land, which before belonged generally to every body, but particularly to nobody. And, as we before obſerved that occupancy gave the right to the temporary *uſe* of the ſoil, ſo it is agreed upon all hands that occupancy gave alſo the original right to the permanent property in the *ſubſtance* of the earth itſelf; which excludes every one elſe but the owner from the uſe of it. There is indeed ſome difference among the writers on natural law, concerning the reaſon why occupancy ſhould convey this right, and inveſt one with this abſolute property: Grotius and Puffendorf inſiſting, that this right of occupancy is founded on a tacit and implied aſſent of all mankind, that the firſt occupant ſhould become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no ſuch implied aſſent, neither is it neceſſary that there ſhould be; for that the very act of occupancy, alone, being a degree of bodily labour, is, from a principle of natural juſtice, without any conſent or compact, ſufficient of itſelf to gain a title. A diſpute that favours too much of nice and ſcholaſtic refinement (1)! However, both ſides agree in this,

(1) But it is of great importance that moral obligations and the rudiments of laws ſhould be referred to true and intelligible principles,

that occupancy is the thing by which the title was in fact originally gained; every man seising to his own continued

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ples, such as the minds of serious and well-disposed men can rely upon with confidence and satisfaction.

Mr. Locke says, "that the labour of a man's body, and the "work of his hands, we may say are properly his. Whatsoever "then he removes out of the state that nature hath provided and "left it in, he hath mixed his labour with, and joined to it some-"thing that is his own, and thereby makes it his property." (*On Gov. c.* 5.)

But this argument seems to be a *petitio principii*; for mixing labour with a thing, can signify only to make an alteration in it's shape or form; and if I had a right to the substance, before any labour was bestowed upon it, that right still adheres to all that remains of the substance, whatever changes it may have undergone: if I had no right before, it is clear that I have none after; and we have not advanced a single step by this demonstration. The account of Grotius and Puffendorf, who maintain that the origin and inviolability of property are founded upon a tacit promise or compact, and therefore we cannot invade another's property without a violation of a promise or a breach of good faith, seems equally, or more superfluous and inconclusive.

There appears to be just the same necessity to call in the aid of a promise to account for, or enforce, every other moral obligation, and to say that men are bound not to beat or murder each other, because they have promised not to do so. Men are bound to fulfil their contracts and engagements, because society could not otherwise exist; men are bound to refrain from another's property, because also society could not otherwise exist. Nothing therefore is gained by resolving one obligation into the other.

But how, or when, then, does property commence? I conceive no better answer can be given, than by occupancy, or when any thing is separated for private use from the common stores of nature. This is agreeable to the reason and sentiments of mankind, prior to all civil establishments. When an untutored Indian has set before him the fruit which he has plucked from the tree that protects him from the heat of the sun, and the shell of water raised from the fountain that springs at his feet; if he is driven by any daring intruder from this repast, so easy to be replaced, he instantly feels and resents

uſe ſuch ſpots of ground as he found moſt agreeable to his own convenience, provided he found them unoccupied by any one elſe.

PROPERTY, both in lands and moveables, being thus originally acquired by the firſt taker, which taking amounts to a declaration that he intends to appropriate the thing to his own uſe, it remains in him, by the principles of univerſal law, till ſuch time as he does ſome other act which ſhews an intention to abandon it; for then it becomes, naturally ſpeaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is poſſeſſed of a jewel, and caſts it into the ſea or a public highway, this is ſuch an expreſs dereliction, that a property will be veſted in the firſt fortunate finder that will ſeiſe it to his own uſe. But if he hides it privately in the earth or other ſecret place, and it is diſcovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he loſes or drops it by accident, it cannot be collected from thence, that he deſigned to quit the poſſeſſion; and therefore in ſuch a caſe the property ſtill remains in the loſer, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treaſure trove[i].

BUT this method, of one man's abandoning his property, and another ſeiſing the vacant poſſeſſion, however well founded in theory, could not long ſubſiſt in fact. It was calculated merely for the rudiments of civil ſociety, and neceſſarily ceaſed among the complicated intereſts and artificial refinements of polite and eſtabliſhed governments. In theſe it was found, that what became inconvenient or uſeleſs to one man, was highly convenient and uſeful to another; who was ready to give in exchange for it ſome equivalent, that

i See Vol. I. pag. 295.

ſents the violation of that law of property, which nature herſelf has written upon the hearts of all mankind.

was

was equally deſirable to the former proprietor. Thus mutual
convenience introduced commercial traffic, and the reciprocal
transfer of property by ſale, grant, or conveyance: which
may be conſidered either as a continuance of the original poſ- [10]
ſeſſion which the firſt occupant had; or as an abandoning of
the thing by the preſent owner, and an immediate ſucceſſive
occupancy of the ſame by the new proprietor. The voluntary
dereliction of the owner, and delivering the poſſeſſion to ano-
ther individual, amount to a transfer of the property; the
proprietor declaring his intention no longer to occupy the
thing himſelf, but that his own right of occupancy ſhall be
veſted in the new acquirer. Or, taken in the other light, if
I agree to part with an acre of my land to Titius, the deed of
conveyance is an evidence of my intending to abandon the
property: and Titius being the only or firſt man acquainted
with ſuch my intention, immediately ſteps in and ſeiſes the
vacant poſſeſſion: thus the conſent expreſſed by the convey-
ance gives Titius a good right againſt me; and poſſeſſion, or
occupancy, confirms that right againſt all the world beſides (2).

THE moſt univerſal and effectual way of abandoning property, is by the death of the occupant: when, both the actual poſſeſſion and intention of keeping poſſeſſion ceaſing, the property which is founded upon ſuch poſſeſſion and intention, ought alſo to ceaſe of courſe. For, naturally ſpeaking, the inſtant a man ceaſes to be, he ceaſes to have any dominion: elſe, if he had a right to diſpoſe of his acquiſitions one moment beyond his life, he would alſo have a right to direct their diſpoſal for a million of ages after him; which would be highly abſurd and inconvenient. All property muſt there-

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(2) Upon whatever principle the right to property is founded, the power of giving and transferring ſeems to follow as a natural conſequence; if the hunter and the fiſherman exchange the produce of their toils, no one ever diſputed the validity of the contract, or the continuance of the original title. This does not ſeem to be aptly explained by occupancy, for it cannot be ſaid that in ſuch a caſe there is ever a vacancy of poſſeſſion.

fore ceafe upon death, confidering men as abfolute individuals, and unconnected with civil fociety: for then, by the principles before eftablifhed, the next immediate occupant would acquire a right in all that the deceafed poffeffed. But as, under civilized governments which are calculated for the peace of mankind, fuch a conftitution would be productive of endlefs difturbances, the univerfal law of almoft every nation (which is a kind of fecondary law of nature) has either given the dying perfon a power of continuing his property, by difpofing of his poffeffions by will; or, in cafe he neglects to difpofe of it, or is not permitted to make any difpofition
[11] at all, the municipal law of the country then fteps in, and declares who fhall be the fucceffor, reprefentative, or heir, of the deceafed; that is, who alone fhall have a right to enter upon this vacant poffeffion, in order to avoid that confufion, which it's becoming again common would occafion [k]. And farther, in cafe no teftament be permitted by the law, or none be made, and no heir can be found fo qualified as the law requires, ftill, to prevent the robuft title of occupancy from again taking place, the doctrine of efcheats is adopted in almoft every country; whereby the fovereign of the ftate, and thofe who claim under his authority, are the ultimate heirs, and fucceed to thofe inheritances, to which no other title can be formed.

THE right of inheritance, or defcent to the children and relations of the deceafed, feems to have been allowed much earlier than the right of devifing by teftament. We are apt to conceive at firft view that it has nature on it's fide; yet we often miftake for nature what we find eftablifhed by long and inveterate cuftom. It is certainly a wife and effectual, but clearly a political, eftablifhment; fince the permanent right of property, vefted in the anceftor himfelf, was no *na-*

k It is principally to prevent any vacancy of poffeffion, that the civil law confiders father and fon as one perfon; fo that upon the death of either, the inheritance does not fo properly defcend, as continue in the hands of the furvivor. *Ff.* 28. 2. 11.

tural,

tural, but merely a *civil*, right (3). It is true, that the tranſmiſſion of one's poſſeſſions to poſterity has an evident tendency to make a man a good citizen and a uſeful member of ſociety: it ſets the paſſions on the ſide of duty, and prompts a man to deſerve well of the public, when he is ſure that the reward of his ſervices will not die with himſelf, but be tranſmitted to thoſe with whom he is connected by the deareſt and moſt tender affections. Yet, reaſonable as this foundation of the

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(3) I cannot agree with the learned Commentator, that the permanent right of property veſted in the anceſtor himſelf (that is, for his life), is not a natural, but merely a civil right.

I have endeavoured to ſhew (Note 1,) that the notion of property is univerſal, and is ſuggeſted to the mind of man by reaſon and nature, prior to all poſitive inſtitutions and civilized refinements. If the laws of the land were ſuſpended, we ſhould be under the ſame moral and natural obligation to refrain from invading each other's property, as from attacking and aſſaulting each other's perſons. And I am obliged alſo to differ from the learned Judge, and all writers upon general law, who maintain, that children have no better claim by nature to ſucceed to the property of their deceaſed parents than ſtrangers; and that the preference given to them, originates ſolely in political eſtabliſhments. (See the Editor's diſtinctions between natural and poſitive laws, Vol. i. p. 58. n. 7.) I know no criterion by which we can determine any rule or obligation to be founded in nature, than it's univerſality; and by inquiring whether it is not, and has not been, in all countries and ages, agreeable to the feelings, affections, and reaſon of mankind. The affection of parents towards their children is the moſt powerful and univerſal principle which nature has planted in the human breaſt; and it cannot be conceived, even in the moſt ſavage ſtate, that any one is ſo deſtitute of that affection and reaſon, who would not revolt at the poſition, that a ſtranger has as good a right as his children to the property of a deceaſed parent.

Hæredes ſucceſſoreſque ſui cuique liberi, ſeems not to have been confined to the woods of Germany, but to be one of the firſt laws in the code of nature; though poſitive inſtitutions may have thought it prudent to leave the parent the full diſpoſition of his property after his death, or to regulate the ſhares of the children, when the parent's will is unknown.

right

right of inheritance may ſeem, it is probable that it's immediate original aroſe not from ſpeculations altogether ſo delicate and refined, and, if not from fortuitous circumſtances, at leaſt from a plainer and more ſimple principle. A man's children or neareſt relations are uſually about him on his
[12] death-bed, and are the earlieſt witneſſes of his deceaſe. They became therefore generally the next immediate occupants, till at length in proceſs of time this frequent uſage ripened into general law. And therefore alſo in the earlieſt ages, on failure of children, a man's ſervants born under his roof were allowed to be his heirs; being immediately on the ſpot when he died. For we find the old patriarch Abraham expreſsly declaring, that "ſince God had given him no ſeed, his ſteward Eliezer, one born in his houſe, was his heir[1]."

WHILE property continued only for life, teſtaments were uſeleſs and unknown; and, when it became inheritable, the inheritance was long indefeaſible, and the children or heirs at law were incapable of excluſion by will. Till at length it was found, that ſo ſtrict a rule of inheritance made heirs diſobedient and head-ſtrong, defrauded creditors of their juſt debts, and prevented many provident fathers from dividing or charging their eſtates as the exigence of their families required. This introduced pretty generally the right of diſpoſing of one's property, or a part of it, by *teſtament;* that is, by written or oral inſtructions properly *witneſſed* and authenticated, according to the *pleaſure* of the deceaſed; which we therefore emphatically ſtile his *will*. This was eſtabliſhed in ſome countries much later than in others. With us in England, till modern times, a man could only diſpoſe of one third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the eighth; and then only of a certain portion: for it was not till after the reſtoration that the power of deviſing real property became ſo univerſal as at preſent (4).

[1] Gen. xv. 3.

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(4) By 32 Hen. VIII. c. 1. all ſocage lands were made deviſable, and two thirds of lands of military tenure; when theſe at the reſtoration

WILLS therefore and teftaments, rights of inheritance and fucceffions, are all of them creatures of the civil or municipal laws, and accordingly are in all refpects regulated by them; every diftinct country having different ceremonies and requifites to make a teftament completely valid: neither does any thing vary more than the right of inheritance under different national eftablifhments. In England particularly, this di- [13] verfity is carried to fuch a length, as if it had been meant to point out the power of the laws in regulating the fucceffion to property, and how futile every claim muft be, that has not it's foundation in the pofitive rules of the ftate. In perfonal eftates the father may fucceed to his children; in landed property he never can be their immediate heir, by any the remoteft poffibility: in general only the eldeft fon, in fome places only the youngeft, in others all the fons together, have a right to fucceed to the inheritance: in real eftates males are preferred to females, and the eldeft male will ufually exclude the reft; in the divifion of perfonal eftates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

THIS one confideration may help to remove the fcruples of many well-meaning perfons, who fet up a miftaken confcience in oppofition to the rules of law. If a man difinherits his fon, by a will duly executed, and leaves his eftate to a ftranger, there are many who confider this proceeding as contrary to natural juftice; while others fo fcrupuloufly adhere to the fuppofed intention of the dead, that if a will of lands be attefted by only *two* witneffes inftead of *three*, which the law requires, they are apt to imagine that the heir is bound in confcience to relinquifh his title to the devifee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the fon had by nature a right to fucceed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the fucceffion of

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ftoration were converted into focage tenure, all lands became devifable, fome copyholds excepted. *P.* 375.

his

his property after his own deceaſe. Whereas the law of nature ſuggeſts, that on the death of the poſſeſſor the eſtate ſhould again become common, and be open to the next occupant, unleſs otherwiſe ordered for the ſake of civil peace by the poſitive law of ſociety. The poſitive law of ſociety, which is with us the municipal law of England, directs it to veſt in ſuch perſon as the laſt proprietor ſhall by will, attended with certain requiſites, appoint; and, in defect of ſuch appointment, to go to ſome particular perſon, who from the reſult
[14] of certain local conſtitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a ſhadow of right in any one but the perſon appointed: and, where the neceſſary requiſites are omitted, the right of the heir is equally ſtrong and built upon as ſolid a foundation, as the right of the deviſee would have been, ſuppoſing ſuch requiſites were obſerved.

BUT, after all, there are ſome few things, which, notwithſtanding the general introduction and continuance of property, muſt ſtill unavoidably remain in common; being ſuch wherein nothing but an uſufructuary property is capable of being had: and therefore they ſtill belong to the firſt occupant, during the time he holds poſſeſſion of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: ſuch alſo are the generality of thoſe animals which are ſaid to be *ferae naturae*, or of a wild and untameable diſpoſition: which any man may ſeiſe upon and keep for his own uſe or pleaſure. All theſe things, ſo long as they remain in poſſeſſion, every man has a right to enjoy without diſturbance; but if once they eſcape from his cuſtody, or he voluntarily abandons the uſe of them, they return to the common ſtock, and any man elſe has an equal right to ſeiſe and enjoy them afterwards.

AGAIN; there are other things, in which a permanent property *may* ſubſiſt, not only as to the temporary uſe, but alſo

alſo the ſolid ſubſtance; and which yet would be frequently found without a proprietor, had not the wiſdom of the law provided a remedy to obviate this inconvenience. Such are foreſts and other waſte grounds, which were omitted to be appropriated in the general diſtribution of lands; ſuch alſo are wrecks, eſtrays, and that ſpecies of wild animals which the arbitrary conſtitutions of poſitive law have diſtinguiſhed from the reſt by the well-known appellation of game. With regard to theſe and ſome others, as diſturbances and quarrels would frequently ariſe among individuals, contending about the acquiſition of this ſpecies of property by firſt occupancy, [15]
the law has therefore wiſely cut up the root of diſſenſion, by veſting the things themſelves in the ſovereign of the ſtate: or elſe in his repreſentatives appointed and authoriſed by him, being uſually the lords of manors (5). And thus the legiſlature of England has univerſally promoted the grand ends of civil ſociety, the peace and ſecurity of individuals, by ſteadily purſuing that wiſe and orderly maxim, of aſſigning to every thing capable of ownerſhip a legal and determinate owner.

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(5) The learned Judge has frequently repeated in his commentaries, that all the game belongs to the king, or to his grantees, being uſually the lords of manors. This is a doctrine which the editor is obliged to controvert. His reaſons and authorities will be ſtated at large in a note to page 419.

CHAPTER THE SECOND.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

THE objects of dominion or property are *things*, as contradistinguished from *persons*: and things are by the law of England distributed into two kinds; things *real*, and things *personal*. Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go.

IN treating of things real, let us consider, first, their several sorts or kinds; secondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

FIRST, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar accept-

ation it is only applied to houſes and other buildings, yet in it's original, proper, and legal ſenſe, it ſignifies every thing that may be *holden*, provided it be of a permanent nature; whether it be of a ſubſtantial and ſenſible, or of an unſubſtantial ideal kind. Thus *liberum tenementum*, franktenement, or freehold, is applicable not only to lands and other ſolid objects, but alſo to offices, rents, commons, and the like [a]: and, as lands and houſes are tenements, ſo is an advowſon a tenement; and a franchiſe, an office, a right of common, a peerage, or other property of the like unſubſtantial kind, are, all of them, legally ſpeaking, tenements [b]. But an *hereditament*, ſays ſir Edward Coke [c], is by much the largeſt and moſt comprehenſive expreſſion: for it includes not only lands and tenements, but whatſoever may be *inherited*, be it corporeal, or incorporeal, real, perſonal, or mixed. Thus an heir-loom, or implement of furniture which by cuſtom deſcends to the heir together with an houſe, is neither land, nor tenement, but a mere moveable: yet, being inheritable, is comprized under the general word hereditament: and ſo a condition, the benefit of which may deſcend to a man from his anceſtor, is alſo an hereditament [d].

HEREDITAMENTS then, to uſe the largeſt expreſſion, are of two kinds, corporeal and incorporeal. Corporeal conſiſt of ſuch as affect the ſenſes; ſuch as may be ſeen and handled by the body: incorporeal are not the object of ſenſation, can neither be ſeen nor handled, are creatures of the mind, and exiſt only in contemplation.

CORPOREAL hereditaments conſiſt wholly of ſubſtantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, ſays ſir Edward Coke [e], comprehendeth in it's legal ſignification any ground, ſoil, or earth whatſoever; as arable, meadows, paſtures, woods, moors, waters, marſhes, furzes, and heath.

a Co. Litt. 6.
b *Ibid.* 19, 20.
c 1 Inſt. 6.
d 3 Rep. 2.
e 1 Inſt. 4.

It legally includeth alfo all caftles, houfes, and other buildings: for they confift, faith he, of two things; *land*, which is the foundation, and *ftructure* thereupon: fo that, if I convey the land or ground, the ftructure or building paffeth therewith. It is obfervable that *water* is here mentioned as a fpecies of land, which may feem a kind of folecifm; but fuch is the language of the law: and therefore I cannot bring an action to recover poffeffion of a pool or other piece of water, by the name of *water* only; either by calculating it's capacity, as, for fo many cubical yards; or, by fuperficial meafure, for twenty acres of water; or by general defcription, as for a pond, a watercourfe, or a rivulet: but I muft bring my action for the land that lies at the bottom, and muft call it twenty acres of *land covered with water* [f]. For water is a moveable wandering thing, and muft of neceffity continue common by the law of nature; fo that I can only have a temporary, tranfient, ufufructuary, property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain fubftantial property; of which the law will take notice, and not of the other.

LAND hath alfo, in it's legal fignification, an indefinite extent, upwards as well as downwards. *Cujus eft folum, ejus eft ufque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line, between the furface of any land and the center of the earth, belongs to the owner of the furface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other foffils, his woods, his waters, and his houfes, as well as his fields and meadows. Not but the particular names of the things are

[f] Brownl. 142.

equally

equally sufficient to pass them, except in the instance of water; by a grant of which, nothing passes but a right of fishing[g]: but the capital distinction is this; that by the name of a castle (1), messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, every thing terrestrial will pass[h].

g Co. Litt. 4. h *Ibid.* 4, 5, 6.

(1) By the name of a castle, one or more manors may be conveyed; and *e converso* by the name of a manor, a castle may pass. 1 *Inst.* 5. 2 *Inst.* 31.

CHAPTER THE THIRD.

OF INCORPOREAL HEREDITAMENTS.

AN incorporeal hereditament is a right iſſuing out of a thing corporate (whether real or perſonal) or concerning, or annexed to, or exerciſible within, the ſame [a]. It is not the thing corporate itſelf, which may conſiſt in lands, houſes, jewels, or the like; but ſomething collateral thereto, as a rent iſſuing out of thoſe lands or houſes, or an office relating to thoſe jewels. In ſhort, as the logicians ſpeak, corporeal hereditaments are the ſubſtance, which may be always ſeen, always handled: incorporeal hereditaments are but a ſort of accidents, which inhere in and are ſupported by that ſubſtance; and may belong, or not belong to it, without any viſible alteration therein. Their exiſtence is merely in idea and abſtracted contemplation; though their effects and profits may be frequently objects of our bodily ſenſes. And indeed, if we would fix a clear notion of an incorporeal hereditament, we muſt be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for inſtance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtleſs of a corporeal nature, yet the annuity itſelf, which produces that money, is a thing inviſible, has only a mental exiſtence, and cannot be delivered over from hand to hand. So tithes, if we conſider the pro-

a Co. Litt. 19, 20.

duce

duce of them, as the tenth ſheaf or tenth lamb, ſeem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they, being merely a contingent ſpringing right, collateral to or iſſuing out of lands, can never be the object of ſenſe: that caſual ſhare of the annual increaſe is not, till ſevered, capable of being ſhewn to the eye, nor of being delivered into bodily poſſeſſion.

INCORPOREAL hereditaments are principally of ten ſorts; advowſons, tithes, commons, ways, offices, dignities, franchiſes, corodies or penſions, annuities, and rents.

I. ADVOWSON is the right of preſentation to a church, or eccleſiaſtical benefice. Advowſon, *advocatio*, ſignifies *in clientelam recipere*, the taking into protection; and therefore is ſynonymous with patronage, *patronatus:* and he who has the right of advowſon is called the patron of the church. For, when lords of manors firſt built churches on their own demeſnes, and appointed the tithes of thoſe manors to be paid to the officiating miniſters, which before were given to the clergy in common, (from whence, as was formerly mentioned [b], aroſe the diviſion of pariſhes,) the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating ſuch miniſter as he pleaſed (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron [c].

THIS inſtance of an advowſon will completely illuſtrate the nature of an incorporeal hereditament. It is not itſelf the bodily poſſeſſion of the church and it's appendages; but it is a right to give ſome other man a title to ſuch bodily poſſeſſion. The advowſon is the object of neither the ſight, nor the touch; and yet it perpetually exiſts in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any viſible bodily transfer, nor can corporal poſſeſſion be

b Vol. I. pag. 112.

c This original of the *jus patronatus*, by building and endowing the church, appears alſo to have been allowed in the Roman empire. *Nov.* 26. *t.* 12. *c.* 2. *Nov.* 118. *c.* 23.

had of it. If the patron takes corporal poſſeſſion of the church, the church-yard, the glebe or the like, he intrudes on another man's property; for to theſe the parſon has an excluſive right. The patronage can therefore be only conveyed by operation of law, by verbal grant (1), either oral or

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(1) The preſent learned Vinerian profeſſor, Mr. Wooddeſon, has taken notice of this inaccuracy, and has obſerved, that "advowſons, merely as ſuch (*i. e.* in groſs), could never in any age "of the Engliſh law, paſs by oral grant without deed." (2 Vol. 64.) Lord Coke ſays expreſsly, that "grant is properly of things "incorporeal, which cannot paſs without deed." (1 *Inſt.* 9.) But before the ſtatute of frauds, 29 Car. II. c. 3. any freehold intereſt in corporeal hereditaments, might have paſſed by a verbal feoffment, accompanied with livery of ſeizin. (*Litt. S.* 59.) And by ſuch a verbal grant of a manor, Mr. Wooddeſon juſtly obſerves, before the ſtatute, an advowſon appendant to it might have been conveyed. (2 Vol. 64.) But he who has an advowſon, or a right of patronage in fee, may by deed transfer every ſpecies of intereſt out of it, *viz.* in fee, in tail, for life, for years, or may grant one or more preſentations.

Although this is a right of great value, yet the poſſeſſion of it never can yield any lucrative benefit to the owner, as the law has provided that the exerciſe of this right muſt be perfectly gratuitous; yet it may be a proviſion for relations, a pledge of friendſhip, or what is it's true uſe and object, the reward of learning and virtue. Hence the mortgagor ſhall preſent when the church is vacant, though the advowſon alone is mortgaged in fee, for the mortgagee could derive no advantage from the preſentation in reduction of his debt. (3 *Atk.* 559.) And for the ſame reaſon, it ſhould ſeem, if a church became vacant before the aſſignees had ſold an advowſon, part of the eſtate of a bankrupt, the bankrupt ſhall preſent upon that vacancy, as the law did not intend to deprive him of any right, which could afford no ſubſtantial benefit to his creditors. And it is now fully ſettled, that neither the next preſentation nor the advowſon, can be ſold whilſt the church is vacant. 3 *Burr.* 1510. An advowſon is aſſets in the hands of the heir. 3 *Bro. P. C.* 556.

But if during the avoidance of a church the patron die, the right to that preſentation paſſes to his executor or perſonal repreſentative, unleſs it is a donative benefice, and in that caſe the right of donation deſcends to the heir. 2 *Wils.* 150.

5 written,

written, which is a kind of inviſible mental transfer: and being ſo veſted, it lies dormant and unnoticed, till occaſion calls it forth: when it produces a viſible, corporeal fruit, by entitling ſome clerk, whom the patron ſhall pleaſe to nominate, to enter and receive bodily poſſeſſion of the lands and tenements of the church.

ADVOWSONS are either advowſons *appendant*, or advowſons *in groſs*. Lords of manors being originally the only founders, and of courſe the only patrons, of churches [d], the right of patronage or preſentation, ſo long as it continues annexed to the poſſeſſion of the manor, as ſome have done from the foundation of the church to this day, is called an advowſon appendant [e]: and it will paſs, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words [f]. But where the property of the advowſon has been once ſeparated from the property of the manor by legal conveyance, it is called an advowſon in groſs, or at large, and never can be appendant any more; but is for the future annexed to the perſon of it's owner, and not to his manor or lands [g].

ADVOWSONS are alſo either *preſentative*, *collative*, or *donative* [h]. An advowſon preſentative is where the patron hath a right of preſentation to the biſhop or ordinary, and moreover to demand of him to inſtitute his clerk, if he finds him canonically qualified: and this is the moſt uſual advowſon. An advowſon collative is where the biſhop and patron are one and the ſame perſon: in which caſe the biſhop cannot preſent to himſelf; but he does, by the one act of collation, or conferring the benefice, the whole that is done in common caſes, [23] by both preſentation and inſtitution. An advowſon donative is when the king, or any ſubject by his licence, doth found a church or chapel, and ordains that it ſhall be merely in the gift or diſpoſal of the patron; ſubject to his viſitation only, and not to that of the ordinary; and veſted abſolutely

d Co. Litt. 119.
e *Ibid.* 121.
f *Ibid.* 307.
g *Ibid.* 120.
h *Ibid.*

in

in the clerk by the patron's deed of donation, without presentation, institution, or induction [i] (2). This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of archbishop Becket in the reign of Henry II. [k] And therefore though pope Alexander III, [l] in a letter to Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shews what was then the common usage. Others contend, that the claim of the bishops to institution is as old as the first planting of christianity in this island; and in proof of it they allege a letter from the English nobility to the pope in the reign of Henry the third, recorded by Matthew Paris [m], which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him; but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of feodal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

i Co. Litt. 344.
k Seld. tith. c. 12. § 2.
l *Decretal. l.* 3. *t.* 7. *c.* 3.
m *A. D.* 1239.

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(2) Two peculiar properties of donatives may be mentioned here; one is, that the presentation does not devolve to the king, as in other livings, when the incumbent is made a bishop (*Ca. Parl.* 184.): the other is taken notice of by Mr. Wooddeson, that donatives are within the statute of pluralities, if a donative is the first living; but if a donative is the second benefice taken without a dispensation, the first would not be void, for the words of the statute are, *instituted and inducted to any other*, which are not applicable to donatives. 1 Vol. 330. And therefore it seems if donatives are taken last, they may be held with any other preferment.

HOWEVER

HOWEVER this may be, if, as the law now ſtands, the true patron *once* waves this privilege of donation, and preſents to the biſhop, and his clerk is admitted and inſtituted, the advowſon is now become for ever preſentative, and ſhall never [24] be donative any more [n]. For theſe exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and conſtrued as ſtrictly as poſſible. If therefore the patron, in whom ſuch peculiar right reſides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will therefore reduce it to the ſtandard of other eccleſiaſtical livings (3).

II. A SECOND ſpecies of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increaſe, yearly ariſing and renewing from the profits of lands, the ſtock upon lands, and the perſonal induſtry of the inhabitants: the firſt ſpecies being uſually called *predial*, as of corn, graſs, hops, and wood [o]; the ſecond *mixed*, as of wool, milk, pigs, *&c.* [p], conſiſting of natural products, but nurtured and preſerved in part by the care of man; and of theſe the tenth muſt be paid in groſs; the third *perſonal*, as of manual occupations, trades, fiſheries, and the like; and of theſe only the tenth part of the clear gains and profits is due [q] (4).

IT is not to be expected from the nature of theſe general commentaries, that I ſhould particularly ſpecify, what things are titheable, and what not; the time when, or the manner

n Co. Litt. 344. Cro. Jac 63.
o 1 Roll. Abr. 635. 2 Inſt. 649.
p *Ibid.*
q 1 Roll. Abr. 656.

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(3) The contrary is held by a later authority than the authorities referred to by the learned Judge; in which it was declared, that although a preſentation may deſtroy an impropriation, yet it cannot deſtroy a donative, becauſe the creation thereof is by letters patent. 1 *Salk.* 541.

(4) But perſonal tithes are only payable by a ſpecial cuſtom, and perhaps are now paid no where in England, except for fiſh caught in the ſea, and for corn mills. 3 *Burn. Ec.* 473.

and

and proportion in which, tithes are uſually due (5). For this I muſt refer to ſuch authors as have treated the matter in detail: and ſhall only obſerve, that, in general, tithes are to be paid for every thing that yields an annual increaſe, as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the ſubſtance of the earth, or is not of annual increaſe, as ſtone, lime, chalk, and the like; nor for creatures that are of a wild nature, or *ferae naturae*, as deer, hawks, *&c.* whoſe increaſe, ſo as to profit the owner, is not annual, but caſual[r] (6). It will rather be our buſineſs to
[25] conſider, 1. The original of the right of tithes. 2. In whom that right at preſent ſubſiſts. 3. Who may be diſcharged, either totally or in part, from paying them.

1. As to their original, I will not put the title of the clergy to tithes upon any divine right; though ſuch a right certainly commenced, and I believe as certainly ceaſed, with the Jewiſh theocracy. Yet an honourable and competent maintenance for the miniſters of the goſpel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be. For, beſides the poſitive precepts of the new teſtament, natural reaſon will tell us, that an order of men, who are ſeparated from the world, and excluded from other lucrative profeſſions, for the ſake of the reſt of mankind, have a right to be furniſhed with the neceſſaries, conveniencies, and moderate enjoyments of life, at their expence, for whoſe benefit they forego the uſual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national prieſts or clergy: ours in particular have eſtabliſhed this of tithes, probably in imita-

[r] 2 Inſt. 651.

(5) This is a very important ſubject, but the diſcuſſion of it here would have no immediate reference to the author's text, and it would be too extenſive for a note; it will therefore be reſerved by the editor for the ſupplemental volume.

(6) Tithes may be payable of deer and rabbits by ſpecial cuſtom.

tion

tion of the Jewiſh law: and perhaps, conſidering the degenerate ſtate of the world in general, it may be more beneficial to the Engliſh clergy to found their title on the law of the land, than upon any divine right whatſoever, unacknowledged and unſupported by temporal ſanctions (7).

WE cannot preciſely aſcertain the time when tithes were firſt introduced into this country. Poſſibly they were contemporary with the planting of chriſtianity among the Saxons, by Auguſtin the monk, about the end of the ſixth century. But the firſt mention of them, which I have met with in any written Engliſh law, is in a conſtitutional decree, made in a ſynod held *A. D.* 786 [s], wherein the payment of tithes in general is ſtrongly enjoined. This canon, or decree, which at firſt bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of eſtates, reſpectively conſiſting of the kings of Mercia and Northumberland, the biſhops, dukes, ſenators, and [26]
people. Which was a few years later than the time that Charlemagne eſtabliſhed the payment of them in France [t], and made that famous diviſion of them into four parts; one to maintain the edifice of the church, the ſecond to ſupport the poor, the third the biſhop, and the fourth the parochial clergy [u].

THE next authentic mention of them is in the *foedus Edwardi et Guthruni;* or the laws agreed upon between king Guthrun the Dane, and Alfred and his ſon Edward the elder, ſucceſſive kings of England, about the year 900. This was a kind of treaty between thoſe monarchs, which

[s] Selden, c. 8. § 2.
[t] *A. D.* 778.
[u] Book I. ch. 11. Seld. c. 6. § 7.
Sp. of laws, b. 31. c. 12.

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(7) The clergy have preciſely the ſame right to tithes, as the heir at law has to his anceſtor's eſtate, or the former to the poſſeſſion in conſequence of his leaſe; and the proprietor has no more reaſon to complain that his land is not tithe-free, than he has that his neighbour's field is not his own.

may

may be found at large in the Anglo-Saxon laws[w]: wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the christian clergy under his dominion; and, accordingly, we find[x] the payment of tithes not only *enjoined*, but a *penalty* added upon non-observance: which law is seconded by the laws of Athelstan[y], about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

2. WE are next to consider the persons to whom they are due. And upon their first introduction (as hath formerly been observed[z]) though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased[a]; which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common[b]. But, when dioceses were divided into parishes, the tithes of each parish were allotted to it's own particular minister; first by common consent, or the appointments of lords of manors, and afterwards by the written law of the land[c].

[27] HOWEVER, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of king John[d]. Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under archbishop Dunstan and his successors: who endeavoured to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves,) and were then in hopes to have drawn, by sanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes.

w Wilkins, pag. 51.
x *cap.* 6.
y *cap.* 1.
z Book I. Introd. § 4.

a 2 Inst. 646. Hob. 296.
b Seld. c. 9. § 4.
c *LL. Edgar. c.* 1 & 2. *Canut. c.* 11.
d Selden. c. 11.

For

For a layman, who was obliged to pay his tithes ſomewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to ſome abbey already erected: ſince, for this dotation, which really coſt the patron little or nothing, he might, according to the ſuperſtition of the times, have maſſes for ever ſung for his ſoul. But, in proceſs of years, the income of the poor laborious pariſh prieſts being ſcandalouſly reduced by theſe arbitrary conſecrations of tithes, it was remedied by pope Innocent the third[e] about the year 1200 in a decretal epiſtle, ſent to the archbiſhop of Canterbury, and dated from the palace of Lateran: which has occaſioned ſir Henry Hobart and others to miſtake it for a decree of the council of Lateran held *A. D.* 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen[f], whereas this letter of pope Innocent to the archbiſhop enjoined the payment of tithes to the parſons of the reſpective pariſhes where every man inhabited, agreeable to what was afterwards directed by the ſame pope in other countries[g]. This epiſtle, ſays ſir Edward Coke[h], bound not the lay ſubjects of this realm: but, being reaſonable and juſt, (and, he might have added, being correſpondent to the antient law,) it was allowed of, and ſo became *lex terrae*. This put an effectual ſtop to all the arbitrary conſecrations of tithes; except ſome footſteps which ſtill continue in thoſe portions of tithes, which the parſon of one pariſh hath, though rarely, a right to claim in another: for it is now univerſally held[i], that tithes are due, of common right, to the parſon of the pariſh, unleſs there be a ſpecial exemption. This parſon of the pariſh, we have formerly ſeen[k], may be either the actual incumbent, or elſe the appropriator of the benefice: appropriations being a method of endowing monaſteries, which ſeems to have been deviſed by the regular clergy, by way of ſubſtitution to arbitrary conſecrations of tithes[l].

[28]

e *Opera Innocent. III. tom.* 2. *pag.* 452.

f *Decretal. l.* 3. *t.* 30. *c.* 19.

g *Ibid. c.* 26.

h 2 Inſt. 641.

i Regiſt. 46. Hob. 296.

k Book I. pag. 385.

l In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See book I. p. 113. 284.

3. WE

3. WE obferved that tithes are due to the parfon of common right, unlefs by fpecial exemption; let us therefore fee, thirdly, who may be exempted from the payment of tithes, and how lands, and their occupiers, may be exempted or difcharged from the payment of tithes, either in part or totally, firft, by a real compofition; or, fecondly, by cuftom or prefcription.

FIRST, a real compofition is when an agreement is made between the owner of the lands, and the parfon or vicar, with the confent of the ordinary and the patron, that fuch lands fhall for the future be difcharged from payment of tithes, by reafon of fome land or other real recompenfe given to the parfon, in lieu and fatisfaction thereof [m]. This was permitted by law, becaufe it was fuppofed that the clergy would be no lofers by fuch compofition; fince the confent of the ordinary, whofe duty it is to take care of the church in general, and of the patron, whofe intereft it is to protect that particular church, were both made neceffary to render the compofition effectual: and hence have arifen all fuch compofitions as exift at this day by force of the common law. But, experience fhewing that even this caution was ineffectual, and
[29] the poffeffions of the church being, by this and other means, every day diminifhed, the difabling ftatute 13 Eliz. c. 10. was made: which prevents, among other fpiritual perfons, all parfons and vicars from making any conveyances of the eftates of their churches, other than for three lives or twenty-one years. So that now, by virtue of this ftatute, no real compofition made fince the 13 Eliz. is good for any longer term than three lives, or twenty-one years, though made by confent of the patron and ordinary: which has indeed effectually demolifhed this kind of traffic; fuch compofitions being now rarely heard of, unlefs by authority of parliament (8).

m 2 Inft. 490. Regift. 38. 13 Rep. 40.

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(8) Such a compofition made fince the 13 Eliz., though confirmed by a decree of the court of chancery, is not binding upon the fucceeding incumbent. (2 *Woodd.* 107.)

With

SECONDLY, a difcharge by cuftom or prefcription, is where time out of mind fuch perfons or fuch lands have been, either partially or totally, difcharged from the payment of tithes. And this immemorial ufage is binding upon all parties; as it is in it's nature an evidence of univerfal confent and acquiefcence, and with reafon fuppofes a real compofition to have been formerly made. This cuftom or prefcription is either *de modo decimandi*, or *de non decimando*.

A *modus decimandi*, commonly called by the fimple name of a *modus* only, is where there is by cuftom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increafe. This is fometimes a pecuniary compenfation, as twopence an acre for the tithe of land: fometimes it is a compenfation in work and labour, as that the parfon fhall have only the twelfth cock of hay, and not the tenth, in confideration of the owner's making it for him: fometimes, in lieu of a large quantity of crude or imperfect tithe, the parfon fhall have a lefs quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in fhort, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or fpecial manner of tithing.

To make a good and fufficient *modus*, the following rules [30]
muft be obferved. 1. It muft be *certain* and *invariable*[n], for

[n] 1 Keb. 602.

With regard to compofitions entered into between the tithe-owner and any parifhioner, for the latter to retain the tithe of his own eftate, it has been decided that they are analogous to leafes from year to year, between landlord and tenant; and if they are paid without, or beyond, an agreement for a fpecific time, they cannot be put an end to without fix months notice before the time of payment; and the parifhioner may avail himfelf of the defect of notice, at the fame time that he controverts the right of the incumbent to receive tithe in kind; an objection not permitted to a tenant, who denies the right of the landlord. Cafe of Kenfington. 2 *Rayner*. 2 *Bro*. 161.

payment of different fums will prove it to be no *modus*, that is, no original real compofition; becaufe that muft have been one and the fame, from it's firft original to the prefent time. 2. The thing given, in lieu of tithes, muft be beneficial to the *parfon*, and not for the emolument of *third perfons* only [o]: thus a *modus*, to repair the *church* in lieu of tithes, is not good, becaufe that is an advantage to the parifh only; but to repair the *chancel* is a good *modus*, for that is an advantage to the parfon. 3. It muft be fomething *different* from the thing compounded for [p]: one load of hay, in lieu of *all* tithe hay, is no good *modus*: for no parfon would *bona fide* make a compofition to receive lefs than his due in the fame fpecies of tithe: and therefore the law will not fuppofe it poffible for fuch compofition to have exifted. 4. One cannot be difcharged from payment of one fpecies of tithe, by paying a *modus* for another [q]. Thus a *modus* of 1*d*. for every *milch* cow will difcharge the tithe of *milch* kine, but not of *barren* cattle: for tithe is, of common right, due for both; and therefore a *modus* for one, fhall never be a difcharge for the other. 5. The recompenfe muft be in it's nature as durable as the tithes difcharged by it; that is, an inheritance certain [r]: and therefore a *modus* that every *inhabitant* of a houfe fhall pay 4*d*. a year, in lieu of the owner's tithes, is no good *modus*; for poffibly the houfe may not be inhabited, and then the recompenfe will be loft. 6. The *modus* muft not be too large, which is called a *rank modus*: as if the real value of the tithes be 60*l*. *per annum*, and a *modus* is fuggefted of 40*l*. this *modus* will not be eftablifhed; though one of 40*s*. might have been valid [s]. Indeed, properly fpeaking, the doctrine of *ranknefs* in a modus, is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law [t]. For, in thefe cafes of prefcriptive or cuftomary *modus's*, it is fuppofed that an original real compofition was antiently made; which being loft by length of time, the immemorial ufage is ad-

[o] 1 Roll. Abr. 649.

[p] 1 Lev. 179.

[q] Cro. Eliz. 446. Salk. 657.

[r] 2 P. Wms. 462.

[s] 11 Mod. 60.

[t] *Pyke v. Dowling*. Hil. 19 Geo. III. C. B.

mitted

mitted as evidence to ſhew that it once did exiſt, and that from thence ſuch uſage was derived. Now time of memory hath been long ago aſcertained by the law to commence from the beginning of the reign of Richard the firſt [t]; and any cuſtom may be deſtroyed by evidence of it's non-exiſtence in any part of the long period from that time to the preſent; wherefore, as this real compoſition is ſuppoſed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* ſet up is ſo rank and large, as that it beyond diſpute exceeds the value of the tithes in the time of Richard the firſt, this *modus* is (in point of evidence) *felo de ſe* and deſtroys itſelf. For, as it would be deſtroyed by any direct evidence to prove it's non-exiſtence at any time ſince that aera, ſo alſo it is deſtroyed by carrying in itſelf this internal evidence of a much later original (9).

A PRESCRIPTION *de non decimando* is a claim to be entirely diſcharged of tithes, and to pay no compenſation in lieu of them. Thus the king by his prerogative is diſcharged from all tithes [u]. So a vicar ſhall pay no tithes to the rector, nor

[t] 2 Inſt. 238, 239. This rule was adopted, when by the ſtatute of Weſtm. 1. (3 Edw. I. c. 39.) the reign of Richard I. was made the time of limitation in a writ of right. But, ſince by the ſtatute 32 Hen. VIII. c. 2. this period (in a writ of right) hath been very rationally reduced to ſixty years, it ſeems unaccountable, that the date of legal preſcription or memory, ſhould ſtill continue to be reckoned from an aera ſo very antiquated. See Litt. § 170. 34 Hen. VI. 37. 2 Roll. Abr. 269. pl. 16.

[u] Cro. Eliz. 511.

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(9) To conſtitute a good modus, it ſeems neceſſary that it ſhould be ſuch as would have been a certain, fair, and reaſonable equivalent or compoſition for the tithes in kind, before the year 1189; and therefore no modus for hops, turkies, or other things introduced into England ſince that time, can be good. *Bunb.* 307.

The queſtion of rankneſs, or rather modus or no modus, is a queſtion of fact, which courts of equity will ſend to a jury, unleſs the groſſneſs of the modus is ſo obvious as to preclude the neceſſity of it. 2 *Bro.* 163. 1 *Bl. R.* 420.

the rector to the vicar, for *ecclesia decimas non solvit ecclesiae* [v]. But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable [w] (10). And, generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet* [x]. But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes, by various ways [y]; as, 1. By real composition: 2. By the pope's bull of exemption: 3. By unity of possession; as when the rectory of a parish,
[32] and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession: 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes [z]. Though upon the dissolution of abbeys by Henry VIII, most of these exemptions from tithes would have fallen with them, and the lands become titheable again: had they not been supported and upheld by the statute 31 Hen. VIII. c. 13. which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them (11).

v Cro. Eliz. 479. 511. Sav. 3. Moor. 910.

w *Ibid.* 479.

x *Ibid.* 511.

y Hob. 309. Cro. Jac. 308.

z 2 Rep. 44. Seld. tith. c. 13. § 2.

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(10) But it seems to be determined that the king's tenant for years, or at will, is not liable to pay tithes, on account of the dignity of the king, who cannot be presumed to have leisure or occasion to cultivate his own lands. *Com. Dig. Dism. E.* 7. 1 *Woodd.* 100.

(11) This provision is peculiar to that statute, and therefore all the lands belonging to the lesser monasteries, dissolved by the 27 Hen. VIII. c. 28. are now liable to pay tithe. *Com. Dig. Dism.* *E.* 7.

And

And from this original have ſprung all the lands, which, being in lay hands, do at preſent claim to be tithe-free: for, if a man can ſhew his lands to have been ſuch abbey lands, and alſo immemorially diſcharged of tithes by any of the means before-mentioned, this is now a good preſcription *de non decimando* (12). But he muſt ſhew both theſe requiſites: for abbey lands, without a ſpecial ground of diſcharge, are not diſcharged of courſe; neither will any preſcription *de non decimando* avail in total diſcharge of tithes, unleſs it relates to ſuch abbey lands.

III. COMMON, or right of common, appears from it's very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as to feed his beaſts, to catch fiſh, to dig turf, to cut wood, or the like[a]. And hence common is chiefly of four ſorts; common of paſture, of piſcary, of turbary, and of eſtovers.

1. COMMON of paſture is a right of feeding one's beaſts on another's land: for in thoſe waſte grounds, which are uſually called commons, the property of the ſoil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, becauſe of vicinage, or in groſs[b].

COMMON *appendant* is a right, belonging to the owners or occupiers of arable land, to put commonable beaſts upon the lord's waſte, and upon the lands of other perſons within the ſame manor. Commonable beaſts are either beaſts of the plough, or ſuch as manure the ground. This is a matter of moſt univerſal right: and it was originally permitted[c], not only for the encouragement of agriculture, but for the neceſ- [33]

a Finch, law. 157.
b Co. Litt. 122.
c 2 Inſt. 86.

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(12) Poſterior uſage is evidence of the antecedent, and has always been allowed ſo in caſes of this nature; for what other evidence can be had? *Ld. Hardw.* 2 *Atk.* 137.

ſity of the thing. For, when lords of manors granted out parcels of land to tenants, for ſervices either done or to be done, theſe tenants could not plough or manure the land without beaſts; theſe beaſts could not be ſuſtained without paſture; and paſture could not be had but in the lord's waſtes, and on the unincloſed fallow grounds of themſelves and the other tenants. The law therefore annexed this right of common, as inſeparably incident, to the grant of the lands; and this was the original of common appendant: which obtains in Sweden, and the other northern kingdoms, much in the ſame manner as in England [d]. Common *appurtenant* ariſeth from no connection of tenure, nor from any abſolute neceſſity: but may be annexed to lands in other lordſhips [e], or extend to other beaſts, beſides ſuch as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This not ariſing from any natural propriety or neceſſity, like common appendant, is therefore not of general right; but can only be claimed by immemorial uſage and preſcription [f], which the law eſteems ſufficient proof of a ſpecial grant or agreement for this purpoſe. Common *becauſe of vicinage*, or neighbourhood, is where the inhabitants of two townſhips, which lie contiguous to each other, have uſually intercommoned with one another; the beaſts of the one ſtraying mutually into the other's fields, without any moleſtation from either. This is indeed only a permiſſive right, intended to excuſe what in ſtrictneſs is a treſpaſs in both, and to prevent a multiplicity of ſuits: and therefore either townſhip may encloſe and bar out the other, though they have intercommoned time out of mind.
[34] Neither hath any perſon of one town a right to put his beaſts originally into the other's common: but if they eſcape, and ſtray thither of themſelves, the law winks at the treſpaſs [g]. Common *in groſs*, or at large, is ſuch as is neither appendant nor appurtenant to land, but is annexed to a man's perſon; being granted to him and his heirs by deed; or it may be claimed by preſcriptive right, as by a parſon of a church, or the

d Stiernh. *de jure Sueonum*, *l*. 2. *c*. 6.

e Cro. Car. 482. 1 Jon. 397.

f Co. Litt. 121, 122.

g *Ibid*. 122.

the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

ALL these species, of pasturable common, may be and usually are limited as to number and time; but there are also commons without stint, and which last all the year (13). By the statute of Merton however, and other subsequent statutes [h], the lord of a manor may enclose so much of the waste as he pleases, for tillage or woodground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law, "approving:" an ancient expression signifying the same as "improving [i] (14)." The lord hath the sole interest in the soil; but the interest of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage [k].

2, 3. COMMON of *piscary* is a liberty of fishing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground [l]. There is also a common of digging for coals, minerals, stones, and the like. All these

[h] 20 Hen. III. c. 4. 29 Geo. II. c. 36. and 31 Geo. II. c. 41.

[i] 2 Inst. 474.

[k] 9 Rep. 113.

[l] Co. Litt. 122.

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(13) It seems to be fully established, that upon all commons appendant or appurtenant to land, the owner of the land can only turn out his own cattle, and such as are *levant* and *couchant* upon the land, to which the right of common is annexed. *Skin.* 137. and see the cases referred to in 2 *Woodd.* 77. and *Com. Dig.* Common.

(14) But the lord cannot approve where the commoners have a right of turbary, piscary, of digging sand, or of taking any species of estovers upon the common. 2 *Inst.* 87. 2 *T. R.* 391. It has been determined, that any person, besides the lord of the manor, who is seised in fee of part of a waste, may approve, provided he leaves a sufficiency of common for the tenants of the manor. 4 *T. R.* 445.

bear a refemblace to common of pafture in many refpects; though in one point they go much farther; common of pafture being only a right of feeding on the herbage and vefture of the foil, which renews annually; but common of turbary, and thofe aforementioned, are a right of carrying away the very foil itfelf.

[35] 4. COMMON of eftovers or *eftouviers*, that is, *neceffaries* (from *eftoffer*, to furnifh) is a liberty of taking neceffary wood, for the ufe or furniture of a houfe or farm, from off another's eftate. The Saxon word, *bote*, is ufed by us as fynonymous to the French *eftovers*: and therefore houfe-bote is a fufficient allowance of wood, to repair, or to burn in, the houfe; which latter is fometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all inftruments of hufbandry: and hay-bote or edge-bote is wood for repairing of hays, hedges, or fences. Thefe botes or eftovers muft be reafonable ones; and fuch any tenant or leffee may take off the land let or demifed to him, without waiting for any leave, affignment, or appointment of the leffor, unlefs he be reftrained by fpecial covenant to the contrary [m].

THESE feveral fpecies of commons do all originally refult from the fame neceffity as common of pafture; *viz.* for the maintenance and carrying on of hufbandry: common of pifcary being given for the fuftenance of the tenant's family; common of turbary and fire-bote for his fuel; and houfe-bote, plough-bote, cart-bote, and hedge-bote, for repairing his houfe, his inftruments of tillage, and the neceffary fences of his grounds.

IV. A FOURTH fpecies of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground. I fpeak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an intereft and a right, though another be owner of

[m] Co. Litt. 41.

the

the ſoil. This may be grounded on a ſpecial permiſſion; as when the owner of the land grants to another a liberty of paſſing over his grounds, to go to church, to market, or the like: in which caſe the gift or grant is particular, and confined to the grantee alone; it dies with the perſon; and, if the grantee leaves the country, he cannot aſſign over his right to any other; nor can he juſtify taking another perſon in his [36] company[n]. A way may be alſo by preſcription; as if all the inhabitants of ſuch a hamlet, or all the owners and occupiers of ſuch a farm, have immemorially uſed to croſs ſuch a ground, for ſuch a particular purpoſe: for this immemorial uſage ſuppoſes an original grant, whereby a right of way thus appurtenant to land or houſes may clearly be created. A right of way may alſo ariſe by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the ſame time tacitly and impliedly gives me a way to come at it; and I may croſs his land for that purpoſe without treſpaſs[o]. For when the law doth give any thing to one, it giveth impliedly whatſoever is neceſſary for enjoying the ſame[p]. By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleaſed: which was the eſtabliſhed rule in public as well as private ways. And the law of England, in both caſes, ſeems to correſpond with the Roman[q] (15).

[n] Finch. law. 31.
[o] *Ibid.* 63.
[p] Co. Litt. 56.
[q] Lord Raym. 725. 1 Brownl. 212. 2 Show. 28. 1 Jon. 297.

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(15) Lord Mansfield took notice of the inaccuracy of this paſſage, in the caſe of Taylor *v.* Whitehead, *Doug.* 716. in which it was determined, that if a man has a right of way over another's land, unleſs the owner of the land is bound by preſcription or his own grant to repair the way, he cannot juſtify going over the adjoining land, when the way is impaſſable by the overflowing of a river; but if public highways are foundrous, paſſengers are juſtified, from principles of convenience and neceſſity, in turning out upon the land next the road.

V. OFFICES,

V. OFFICES, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments: whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators [r]. Neither can any *judicial* office be granted in reversion; because though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient: but *ministerial* offices may be so granted [s]; for those may be executed by deputy. Also, by statute 5 & 6 Edw. VI. c. 16. no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it. For
[37] the law presumes that he, who buys an office, will by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public (16).

VI. DIGNITIES bear a near relation to offices. Of the nature of these we treated at large in the former book [t]: it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VII. FRANCHISES are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is [u], a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's

[r] 9 Rep. 97.
[s] 11 Rep. 4.
[t] See book I. ch. 12.
[u] Finch. L. 164.

(16) If two offices are incompatible, by the acceptance of the latter, the first is relinquished and vacant, even if it should be a superior office. 2 *T. R.* 81.

grant;

grant; or, in ſome caſes, may be held by preſcription, which, as has been frequently ſaid, preſuppoſes a grant. The kinds of them are various, and almoſt infinite: I will here briefly touch upon ſome of the principal; premiſing only, that they may be veſted in either natural perſons or bodies politic; in one man, or in many: but the ſame identical franchiſe, that has before been granted to one, cannot be beſtowed on another, for that would prejudice the former grant [w].

To be a county palatine is a franchiſe, veſted in a number of perſons. It is likewiſe a franchiſe for a number of perſons to be incorporated, and ſubſiſt as a body politic; with a power to maintain perpetual ſucceſſion and do other corporate acts: and each individual member of ſuch corporation is alſo ſaid to have a franchiſe or freedom. Other franchiſes are, to hold a court leet: to have a manor or lordſhip; or, at leaſt, to have a lordſhip paramount: to have waifs, wrecks, eſtrays, treaſure-trove, royal fiſh, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas; and trying cauſes: to have the cognizance of pleas; which is a ſtill greater liberty, being an excluſive right, ſo that no other court ſhall try cauſes ariſing within that juriſdiction: to have a bailiwick, or liberty exempt from the ſheriff of the county; [38]
wherein the grantee only, and his officers, are to execute all proceſs: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls muſt have a reaſonable cauſe of commencement, (as in conſideration of repairs, or the like,) elſe the franchiſe is illegal and void [x]: or, laſtly, to have a foreſt, chaſe, park, warren, or fiſhery, endowed with privileges of royalty; which ſpecies of franchiſe may require a more minute diſcuſſion.

As to a *foreſt*: this, in the hands of a ſubject, is properly the ſame thing with a chaſe; being ſubject to the common

[w] 2 Roll. Abr. 191. Keilw. 196.

[x] 2 Inſt. 220.

law,

law, and not to the foreſt laws[y] (17). But a *chaſe* differs from a park, in that it is not incloſed, and alſo in that a man may have a chaſe in another man's ground as well as in his own, being indeed the liberty of keeping beaſts of chaſe or royal game therein, protected even from the owner of the land with a power of hunting them thereon. A *park* is an incloſed chaſe, extending only over a man's own grounds. The word *park* indeed properly ſignifies an encloſure; but yet it is not every field or common, which a gentleman pleaſes to ſurround with a wall or paling, and to ſtock with a herd of deer, that is thereby conſtituted a legal park: for the king's grant, or at leaſt immemorial preſcription, is neceſſary to make it ſo[z]. Though now the difference between a real park, and ſuch encloſed grounds, is in many reſpects not very material: only that it is unlawful at common law for any perſon to kill any beaſts of park or chaſe[a] (18), except ſuch as poſſeſs theſe franchiſes of foreſt, chaſe, or park. *Free warren* is a ſimilar franchiſe, erected for preſervation or cuſtody (which the word ſignifies) of beaſts and fowls of warren[b]; which, being *ferae na-*

y 4 Inſt. 314.

z Co. Litt. 233. 2 Inſt. 199. 11 Rep. 86.

a Theſe are properly buck, doe, fox, martin and roe; but in a common and legal ſenſe extend likewiſe to all the beaſts of the foreſt: which, beſides the other, are reckoned to be hart, hind, hare, boar, and wolf, and in a word, all wild beaſts of venary or hunting. (Co. Litt. 233.)

b The beaſts are hares, conies, and roes: the fowls are either *campeſtres*, as partridges, rails, and quails; or *ſylveſtres*, as

(17) The king, before the *charta de foreſta*, could have made a foreſt wherever he pleaſed over the lands of his ſubjects; but after the boundaries of the diſtrict fixed upon were marked out and proclaimed by the ſheriff, it was only a chaſe till proper officers were appointed, when it became a foreſt, and under the juriſdiction of the chief juſtice in eyre. *Manw.* tit. *Foreſt*, pl. 7. A foreſt is not neceſſarily a chaſe in the hands of a ſubject; for it may be granted by the king, ſubject to the juſtice-ſeat and the foreſt laws, as the duke of Lancaſter, and duke of Norfolk, and many other noblemen have had foreſts ſubject to the foreſt laws; but if the juriſdiction is not added in the grant, it becomes a chaſe, and treſpaſſers in it are puniſhable only by the common law. *Ib.* pl. 67. *et ſeq.* 4 *Inſt.* 314.

(18) See this controverted in a note to page 419, pq.

turae, every one had a natural right to kill as he could: but upon the introduction of the forest laws, at the Norman conquest, as will be shewn hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man therefore that has the franchise of warren, is in reality no more than a royal game-keeper: but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free-warren [c] (20). This franchise is almost fallen into disregard, since the new statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in antient times, who have sold their estates, and reserved the free-warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free-warren over another's ground [d] (21). A *free fishery*, or

as woodcocks and pheasants; or *aquatiles*, as mallards and herons. (*ibid.*)(19).

c Salk. 637.

d Bro. *Abr. tit. Warren.* 3.

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(19) Upon the forest laws I should consider Manwood higher authority than sir Edward Coke.

Manwood informs us, that a forest is not a privileged place for all manner of beasts or fowls, but only for beasts of forest, chase, or warren, and no other; that is, for the hart, the hind, and the hare, which are beasts of the forest; the buck, the doe, the fox, which are beasts of the chase; the hare, the coney, the pheasant, and the partridge, which are beasts and fowls of warren; and no other. The game of free-warren are such as may be taken with long-winged hawks. *For.* pl. 20. *Warren.*

(20) But the owner of a free-warren neither kept nor killed the game for the use of the king: the doctrine which the learned Judge frequently repeats, that no one by the common law can justify sporting upon his own ground, is controverted at large by the Editor in a note to page 419, *post*.

(21) Any one may now lease or convey his land, and reserve to himself the right of entering to kill game without being subject

exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feodal polity has prevailed[e]: though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by king John's great charter; and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested[f]. This opening was extended, by the second[g] and third[h] charters of Henry III, to those also that were fenced under Richard I; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II. This differs from a *several* fishery; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil[i], which in a free fishery is not requisite (22). It differs also from a *common* of piscary before-mentioned, in that the free fishery is an exclu-
[40] sive right, the common of piscary is not so: and therefore, in a free fishery, a man has a property in the fish before they are caught; in a common of piscary not till afterwards[k]. Some indeed have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor[l]. But to consider such right as originally a flower of the prerogative, till restrained by *magna carta*, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed. For it

e Seld. *Mar. Clauf. I.* 24. Dufresne. V. 503. Crag. *de Jur. feod. II.* 8. 15.
f *cap.* 47. *edit. Oxon.*
g *cap.* 20.
h 9 Hen. III. *c.* 16.
i *M.* 17 *Edw. IV.* 6. *P.* 18 *Edw. IV.* 4. *T.* 10 *Hen. VII.* 24. 26. Salk. 637.
k F. N. B. 88. Salk. 637.
l 2 Sid. 8.

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to be sued as a trespasser; but the right of free-warren can only exist by the king's grant, or by prescription, from which such a grant is presumed. *Manw. Warren. Forest*, pl. 43.

(22) A subject may have, by prescription, a right to a several fishery in an arm of the sea. 4 *T. R.* 437.

must be acknowleged, that the rights and distinctions of the three species of fishery are very much confounded in our law-books; and that there are not wanting respectable authorities [m] which maintain, that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

VIII. CORODIES are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance [n]. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted [o]. And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

IX. ANNUITIES, which are much of the same nature; only that these arise from temporal, as the former from spiritual, persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor [p]. Therefore, if a man by deed grant to another the sum of 20 *l. per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity: which is of so little account in the law, that, if granted to an eleemosynary corporation, it is not within the statutes of mortmain [q]; and yet a man may have a real estate in it, though his security is merely personal (24).

[m] See them well digested in Hargrave's notes on Co. Litt. 122. (23)

[n] Finch. L. 162.

[o] See book I. ch. 8.

[p] Co. Litt. 144.

[q] *Ibid.* 2.

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(23) The alterations made in the text in consequence of the observations of Mr. Hargrave upon this subject, prove the candour and liberality of the learned Judge, and his readiness to correct any inaccuracy, when it was pointed out to him.

(24) See annuities for lives, page 461, *post*.

X. RENTS

X. RENTS are the laſt ſpecies of incorporeal hereditaments. The word rent or render, *reditus*, ſignifies a compenſation or return, it being in the nature of an acknowlegement given for the poſſeſſion of ſome corporeal inheritance [q]. It is defined to be a certain profit iſſuing yearly out of lands and tenements corporeal. It muſt be a *profit*; yet there is no occaſion for it to be, as it uſually is, a ſum of money: for ſpurs, capons, horſes, corn, and other matters may be rendered, and frequently are rendered by way of rent [r]. It may alſo conſiſt in ſervices or manual operations; as, to plough ſo many acres of ground, to attend the king or the lord to the wars, and the like; which ſervices in the eye of the law are profits. This profit muſt alſo be *certain*; or that which may be reduced to a certainty by either party. It muſt alſo iſſue *yearly*; though there is no occaſion for it to iſſue every ſucceſſive year; but it may be reſerved every ſecond, third, or fourth year [s]; yet, as it is to be produced out of the profits of lands and tenements, as a recompenſe for being permitted to hold or enjoy them, it ought to be reſerved yearly, becauſe thoſe profits do annually ariſe and are annually renewed. It muſt *iſſue out* of the thing granted, and not be part of the land or thing itſelf; wherein it differs from an exception in the grant, which is always of part of the thing granted [t]. It muſt, laſtly, iſſue out of *lands and tenements corporeal*; that is, from ſome inheritance whereunto the owner or grantee of the rent may have recourſe to diſtrain. Therefore a rent cannot be reſerved out of an advowſon, a common, an office, a franchiſe, or the like [u]. But a grant of ſuch annuity or ſum may operate as a perſonal contract, and oblige the grantor to pay the money reſerved, or ſubject him to an action of debt [w] (25):

q Co. Litt. 144.
r *Ibid.* 142.
s *Ibid.* 47.
t Plowd. 13. 8 Rep. 71.
u Co. Litt. 144.
w *Ibid.* 47.

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(25) There can be no doubt but the leſſee of tithes, an advowſon, or any incorporeal hereditament, would be liable to an action of debt for the rent agreed upon. See 2 *Woodd.* 69, where this paſſage is taken notice of.

though

though it doth not affect the inheritance, and is no legal rent in contemplation of law.

THERE are at common law [x] three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it hath some corporal service incident to it, as at the [42] least fealty or the feodal oath of fidelity [y]. For, if a tenant holds his land by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrein of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired [z]. A *rent-charge*, is where the owner of the rent hath no future interest, or reversion expectant in the land: as where a man by deed maketh over to others his *whole* estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere, or behind, it shall be lawful to distrein for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a rent-*charge* because in this manner the land is charged with a distress for the payment of it [a] (26). *Rent-seck, reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

THERE are also other species of rents, which are reducible to these three. Rents of *assise* are the certain established rents of the freeholders and ancient copyholders of a manor [b], which cannot be departed from or varied. Those of the

[x] Litt. § 213.
[y] Co. Litt. 142.
[z] Litt. § 215.
[a] Co. Litt. 143.
[b] 2 Inst. 19.

(26) A clear rent-charge must be free from the land-tax. *Doug*. 602.

freeholders are frequently called *chief* rents, *reditus capitales*; and both sorts are indifferently denominated *quit* rents, *quieti reditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were antiently called *white*-rents, or *blanch-farms*, *reditus albi* [c]; in contradistinction to rents reserved in work, grain, or baser money, which were called
[43] *reditus nigri* or *black mail* [d]. *Rack*-rent is only a rent of the full value of the tenement or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one fourth of the value of the lands, at the time of it's reservation [e]: for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee simple instead of the usual methods for life or years (27).

THESE are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assise, and chief-rents, as in case of rents reserved upon lease [f] (28).

RENT is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation [g]: but, in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country [h]. And, strictly, the rent is demandable and

c In Scotland this kind of small payment is called *blanch-holding*, or *reditus albae firmae*.

d 2 Inst. 19.

e Co. Litt. 143.

f Stat. 4 Geo. II. c. 28.

g Co. Litt. 201.

h 4 Rep. 73.

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(27) Mr. Hargrave is of opinion, that the quantum of the rent is not essential to create a fee-farm. *Harg. Co. Litt.* 145 *b.* n. 5; where he differs from Mr. Douglas, who had thought that a fee-farm was not necessarily a rent-charge, but might also be a rent-seck. *Doug.* 605.

(28) That is, for such as had been paid for three years, within 20 years before the passing that act, or for such as have been since created. 4 *Geo. II. c.* 28. *f.* 5. *Doug.* 602.

payable

payable before the time of ſun-ſet of the day whereon it is reserved [i]; though perhaps not abſolutely due till midnight [k] (29).

WITH regard to the original of rents, ſomething will be ſaid in the next chapter; and, as to diſtreſſes and other remedies for their recovery, the doctrine relating thereto, and the ſeveral proceedings thereon, theſe belong properly to the third part of our commentaries, which will treat of civil injuries, and the means whereby they are redreſſed.

i Co. Litt. 302. 1 Anderſ. 253.
k 1 Saund. 287. Prec. Chanc. 555. Salk. 578.

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(29) If the leſſor dies before ſun-ſet on the day upon which the rent is demandable, it is clearly ſettled that the rent unpaid is due to his heir, and not to his executor; but if he dies after ſun-ſet and before midnight, it ſeems to be the better opinion, that it ſhall go to the executor and not to the heir. 1 *P. Wms.* 178.

CHAPTER THE FOURTH.

OF THE FEODAL SYSTEM.

IT is impoſſible to underſtand, with any degree of accuracy, either the civil conſtitution of this kingdom (1), or the laws which regulate it's landed property, without ſome general acquaintance with the nature and doctrine of feuds, or the feodal law: a ſyſtem ſo univerſally received throughout Europe upwards of twelve centuries ago, that ſir Henry Spelman [a] does not ſcruple to call it the law of nations in our weſtern world. This chapter will be therefore dedicated to this inquiry. And though, in the courſe of our obſervations in this and many other parts of the preſent book, we may have occaſion to ſearch pretty highly into the antiquities of our Engliſh juriſprudence, yet ſurely no induſtrious ſtudent will imagine his time miſemployed, when he is led to conſider that the obſolete doctrines of our laws are frequently the foundation upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern

[a] of parliaments, 57.

(1) An intimate acquaintance with the feudal ſyſtem is abſolutely neceſſary to the attainment of a comprehenſive knowledge of the firſt principles and progreſs of our conſtitution. And this ſubject, in my opinion, might with great propriety have preceded the chapter upon parliament. The authority of lord Coke, upon conſtitutional queſtions, is greatly diminiſhed by his neglect of the ſtudy of the feudal law; which ſir Henry Spelman, who well knew it's value and importance, feelingly laments: "I do marvel many "times, that my lord Coke, adorning our law with ſo many "flowers of antiquity and foreign learning, hath not turned into "this field, from whence ſo many roots of our law have, of old, "been taken and tranſplanted." *Spelm. Orig. of Terms*, c. viii.

law.

law, in a ſcholarlike ſcientifical manner, without having recourſe to the antient. Nor will theſe reſearches be altogether void of rational entertainment as well as uſe: as in viewing the majeſtic ruins of Rome or Athens, of Balbec or Palmyra, it adminiſters both pleaſure and inſtruction to compare them with the draughts of the ſame edifices, in their priſtine proportion and ſplendor.

THE conſtitution of feuds[b] had its original from the [45]
military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the ſame *officina gentium*, as Crag very juſtly entitles it[c], poured themſelves in vaſt quantities into all the regions of Europe, at the declenſion of the Roman empire. It was brought by them from their own countries, and continued in their reſpective colonies as the moſt likely means to ſecure their new acquiſitions: and, to that end, large diſtricts or parcels of land were allotted by the conquering general to the ſuperior officers of the army, and by them dealt out again in ſmaller parcels or allotments to the inferior officers and moſt deſerving ſoldiers[d]. Theſe allotments were called *feoda*, feuds, fiefs, or fees; which laſt appellation in the northern languages[e] ſignifies a conditional ſtipend or reward[f]. Rewards or ſtipends they evi-

[b] See Spelman of feuds, and Wright of tenures, *per tot.*

[c] *De jure feod.* 19, 20.

[d] Wright, 7.

[e] Spelm. *Gl.* 216.

[f] Pontoppidan in his hiſtory of Norway, (page 290) obſerves, that in the northern languages odh ſignifies *proprietas* and all *totum*. Hence he derives the odhal right in thoſe countries; and thence too perhaps is derived the *udal* right in Finland, &c. (See Mac Doual Inſt. part. 2.) Now the tranſpoſition of theſe northern ſyllables, allodh, will give us the true etymology of the *allodium*, or abſolute property of the feudiſts (2): as, by a ſimilar combination of the latter ſyllable with the word fee (which ſignifies, we have ſeen, a conditional reward or ſtipend) feeodh or *feodum* will denote ſtipendiary property.

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(2) This is the ſame as *all hood* in Engliſh, and is ſuggeſted as the derivation of *allodium* in *Woll. Religion of Nat. del.* p. 136.

Dr. Robertſon adopts the derivation of *allodium* from *an* and *lot*, or allotment, the mode of dividing what was not granted as ſtipen-

diary

dently were: and the condition annexed to them was, that the poſſeſſor ſhould do ſervice faithfully, both at home and in the wars, to him by whom they were given; for which purpoſe he took the *juramentum fidelitatis*, or oath of fealty [g]: and in caſe of the breach of this condition and oath, by not performing the ſtipulated ſervice, or by deſerting the lord in battle, the lands were again to revert to him who granted them [h].

ALLOTMENTS, thus acquired, naturally engaged ſuch as accepted them to defend them: and, as they all ſprang from
[46] the ſame right of conqueſt, no part could ſubſiſt independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's poſſeſſions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpoſe ſubordination, was neceſſary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewiſe ſubordinate to, and under the command of, his immediate benefactor or ſuperior; and ſo upwards to the prince or general himſelf: and the ſeveral lords were alſo reciprocally bound, in their reſpective gradations, to protect the poſſeſſions they had given. Thus the feodal connection was eſtabliſhed, a proper military ſubjection was naturally introduced, and an army of feudatories was always ready enliſted, and mutually prepared to muſter, not only in defence of each man's own ſeveral pro-

g See this oath explained at large in *Feud. l. 2. t. 7.*
h *Feud. l. 2. t. 24.*

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diary property; and he relates the memorable ſtory of the fierce ſoldier who refuſed to grant a ſacred vaſe to his general Clovis, the founder of the French monarchy, who wiſhed to return it at the requeſt of the biſhop to the church from which it had been taken as ſpoil, by ſtriking it violently with his battle-axe, and declaring "that you ſhould have nothing but that to which the lot "gives you a right!" *Hiſt. of Ch. V.* 1 vol. notes 7 & 8.

perty,

perty, but alſo in defence of the whole, and of every part of this their newly-acquired country [i]; the prudence of which conſtitution was ſoon ſufficiently viſible in the ſtrength and ſpirit, with which they maintained their conqueſts.

THE univerſality and early uſe of this feodal plan, among all thoſe nations, which in complaiſance to the Romans we ſtill call barbarous, may appear from what is recorded [k] of the Cimbri and Teutones, nations of the ſame northern original as thoſe whom we have been deſcribing, at their firſt irruption into Italy about a century before the chriſtian æra. They demanded of the Romans, "*ut martius populus aliquid* "*ſibi terrae daret, quaſi ſtipendium : caeterum, ut vellet, mani*-"*bus atque armis ſuis uteretur.*" The ſenſe of which may be thus rendered; they deſired ſtipendiary lands (that is, feuds) to be allowed them, to be held by military and other perſonal ſervices, whenever their lords ſhould call upon them. This was evidently the ſame conſtitution, that diſplayed itſelf more fully about ſeven hundred years afterwards: when the Salii, Burgundians, and Franks broke in upon Gaul, the Viſigoths on Spain, and the Lombards upon Italy; and introduced [47] with themſelves this northern plan of polity, ſerving at once to diſtribute and to protect the territories they had newly gained. And from hence too it is probable that the emperor Alexander Severus [l] took the hint, of dividing lands conquered from the enemy among his generals and victorious ſoldiery, duly ſtocked with cattle and bondmen, on condition of receiving military ſervice from them and their heirs for ever.

SCARCE had theſe northern conquerors eſtabliſhed themſelves in their new dominions, when the wiſdom of their conſtitutions, as well as their perſonal valour, alarmed all the

i Wright, 8.

k *L. Florus, l.* 3. *c.* 3.

l "*Sola, quae de hoſtibus capta ſunt,* "*limitaneis ducibus & militibus donavit;* "*ita ut eorum ita eſſent, ſi haeredes illo*-"*rum militarent, nec unquam ad priva*-"*tos pertinerent: dicens attentius illos* "*militaturos, ſi etiam ſua rura defende*-"*rent. Addidit ſane his et animalia et* "*ſervos, ut poſſent colere quod acceperant;* "*ne per inopiam hominum vel per ſenec*-"*tutem desererentur rura vicina barba*-"*riae, quod turpiſſimum ille ducebat.*" (Æl. Lamprid. *in vita Alex. Severi.*)

princes of Europe; that is, of thoſe countries which had formerly been Roman provinces, but had revolted, or were deſerted by their old maſters, in the general wreck of the empire. Wherefore moſt, if not all, of them thought it neceſſary to enter into the ſame or a ſimilar plan of policy. For whereas, before, the poſſeſſions of their ſubjects were perfectly *allodial*, (that is, wholly independent, and held of no ſuperior at all) now they parcelled out their royal territories, or perſuaded their ſubjects to ſurrender up and retake their own landed property, under the like feodal obligations of military fealty [m]. And thus, in the compaſs of a very few years, the feodal conſtitution, or the doctrine of tenure, extended itſelf over all the weſtern world. Which alteration of landed property, in ſo very material a point, neceſſarily drew after it an alteration of laws and cuſtoms: ſo that the feodal laws ſoon drove out the Roman, which had hitherto univerſally obtained, but now became for many centuries loſt and forgotten; and Italy itſelf (as ſome of the civilians, with more ſpleen than judgment, have expreſſed it) *belluinas, atque ferinas, immaneſque Longobardorum leges accepit* [n].

[48] But this feodal polity, which was thus by degrees eſtabliſhed over all the continent of Europe, ſeems not to have been received in this part of our iſland, at leaſt not univerſally and as a part of the national conſtitution, till the reign of William the Norman [o]. Not but that it is reaſonable to believe, from abundant traces in our hiſtory and laws, that even in the times of the Saxons, who were a ſwarm from what ſir William Temple calls the ſame northern hive, ſomething ſimilar to this was in uſe; yet not ſo extenſively, nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly ſettled in this iſland, at leaſt as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe [p].

[m] Wright, 10.

[n] Gravin. *Orig. l.* 1. § 139.

[o] Spelm. *Gloſſ.* 218. Bract. *l.* 2. *c.* 16. § 7.

[p] Crag. *l.* 1. *t.* 4.

This

THIS introduction however of the feudal tenures into England, by king William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the conqueror, and afterwards universally consented to by the great council of the nation long after his title was established. Indeed from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seised on all the lands of England, and dealt them out again to his own favourites. A supposition, grounded upon a mistaken sense of the word *conquest*; which, in it's feodal acceptation, signifies no more than *acquisition*: and this has led many hasty writers into a strange historical mistake, and one which upon the slightest examination will be found to be most untrue. However, certain it is, that the Normans now began to gain very [49]
large possessions in England; and their regard for the feodal law, under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect it's establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle[q], that in the nineteenth year of king William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in it's stead, the kingdom was wholly

[q] *A. D.* 1085.

defenceless:

defenceleſs: which occaſioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppreſſed the people. This apparent weakneſs, together with the grievances occaſioned by a foreign ſorce, might co-operate with the king's remonſtrances, and the better incline the nobility to liſten to his propoſals for putting them in a poſture of defence. For as ſoon as the danger was over, the king held a great council to inquire into the ſtate of the nation [r]; the immediate conſequence of which was the compiling of the great ſurvey called domeſday-book, which was finiſhed in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders ſubmitted their lands to the yoke of military tenure, became the king's vaſals, and did homage and fealty to his perſon [s]. This may poſſibly have been the aera of formally introducing the feodal tenures by law; and perhaps the very law, thus
[50] made at the council of Sarum, is that which is ſtill extant [t], and couched in theſe remarkable words: "*ſtatuimus, ut omnes* "*liberi homines foedere et ſacramento affirment, quod intra et* "*extra univerſum regnum Angliae Wilhelmo regi domino ſuo fi-* "*deles eſſe volunt*; *terras et honores illius omni fidelitate ubique* "*ſervare cum eo, et contra inimicos et alienigenas defendere.*" The terms of this law (as ſir Martin Wright has obſerved [u]) are plainly feodal: for, firſt, it requires the oath of fealty, which made in the ſenſe of the feudiſts every man that took it a tenant or vaſal: and, ſecondly, the tenants obliged themſelves to defend their lords territories and titles againſt all enemies foreign and domeſtic. But what clearly evinces the legal eſtabliſhment of this ſyſtem, is another law of the ſame collection [w], which exacts the performance of the military feodal ſervices, as ordained by the general council. "*Omnes*

[r] *Rex tenuit magnum concilium, et graves ſermones habuit cum ſuis proceribus de hac terra; quo modo incoleretur, et a quibus hominibus. Chron. Sax. ibid.*

[s] *Omnes praedia tenentes, quotquot eſſent notae melioris per totam Angliam, ejus homines facti ſunt, et omnes ſe illi ſubdidere, ejuſque facti ſunt vaſalli, ac ei fidelitatis juramenta praeſtiterunt, ſe contra alios quoſcunque illi fidos futuros. Chron. Sax. A. D.* 1086.

[t] *cap.* 52. Wilk. 228.

[u] Tenures, 66.

[w] *cap.* 58. Wilk. 228.

"*comites,*

"*comites, et barones, et milites, et servientes, et universi liberi*
"*homines totius regni nostri praedicti, habeant et teneant se sem-*
"*per bene in armis et in equis, ut decet et oportet: et sint semper*
"*prompti et bene parati, ad servitium suum integrum nobis ex-*
"*plendum et peragendum, cum opus fuerit; secundum quod nobis*
"*debent de foedis et tenementi suis de jure facere, et sicut illis*
"*statuimus per commune concilium totius regni nostri praedicti.*"

THIS new polity therefore seems not to have been *imposed* by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all it's allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the allodial estates in France were converted into feuds, and the freemen became the vasals of the crown [x]. The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually, by the consent of private persons; the latter was done at [51] once, all over England, by the common consent of the nation [y].

IN consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his "kingdom [z]; and that no man doth or can possess any part of "it, but what has mediately or immediately been derived as "a gift from him, to be held upon feodal services." For, this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the

[x] Montesq. Sp. L. b. 31. c. 8.

[y] Pharaoh thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reserving an annual render of the fifth part of their value. (Gen. c. xlvii.)

[z] *Tout fuit in luy, et vient de luy al commencement.* (*M. 24 Edw. III. 65.*)

same

ſame ſuppoſition, as a ſubſtruction and foundation of their new polity, though the fact was indeed far otherwiſe. And indeed, by thus conſenting to the introduction of feodal tenures, our Engliſh anceſtors probably meant no more than to put the kingdom in a ſtate of defence by eſtabliſhing a military ſyſtem; and to oblige themſelves (in reſpect of their lands) to maintain the king's title and territories, with equal vigour and fealty, *as if* they had received their lands from his bounty upon theſe expreſs conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, ſkilled in all the niceties of the feodal conſtitutions, and well underſtanding the import and extent of the feodal terms, gave a very different conſtruction to this proceeding: and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but alſo ſuch fruits and dependencies, ſuch hardſhips and ſervices, as were never known to other nations [a]; as if the Engliſh had, in fact as well as theory, owed every thing they had to the bounty of their ſovereign lord.

OUR anceſtors therefore, who were by no means beneficiaries, but had barely conſented to this fiction of tenure from
[52] the crown, as the baſis of a military diſcipline, with reaſon looked upon theſe deductions as grievous impoſitions, and arbitrary concluſions from principles that, as to them, had no foundation in truth [b]. However, this king, and his ſon William Rufus, kept up with a high hand all the rigours of the feodal doctrines: but their ſucceſſor, Henry I. found it expedient, when he ſet up his pretenſions to the crown, to promiſe a reſtitution of the laws of king Edward the confeſſor, or antient Saxon ſyſtem; and accordingly, in the firſt year of his reign, granted a charter [c], whereby he gave up the greater grievances, but ſtill reſerved the fiction of feodal tenure, for the ſame military purpoſes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himſelf and ſucceeding princes; till in the reign of

[a] Spelm. of Feuds. c. 28.

[b] Wright. 81.

[c] *LL. Hen. I. c.* 1.

king

king John they became ſo intolerable, that they occaſioned his barons, or principal feudatories, to riſe up in arms againſt him: which at length produced the famous great charter at Runing-mead, which, with ſome alterations, was confirmed by his ſon Henry III. And, though it's immunities (eſpecially as altered on it's laſt edition by his ſon [d]) are very greatly ſhort of thoſe granted by Henry I, it was juſtly eſteemed at the time a vaſt acquiſition to Engliſh liberty. Indeed, by the farther alteration of tenures that has ſince happened, many of theſe immunities may now appear, to a common obſerver, of much leſs conſequence than they really were when granted: but this, properly conſidered, will ſhew, not that the acquiſitions under John were ſmall, but that thoſe under Charles were greater. And from hence alſo ariſes another inference; that the liberties of Engliſhmen are not (as ſome arbitrary writers would repreſent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakneſs; but a reſtoration of that antient conſtitution, of which our anceſtors had been defrauded by the art and fineſſe of the Norman lawyers, rather than deprived by the force of the Norman arms.

HAVING given this ſhort hiſtory of their riſe and progreſs, [53] we will next conſider the nature, doctrine, and principal laws of feuds; wherein we ſhall evidently trace the groundwork of many parts of our public polity, and alſo the original of ſuch of our own tenures, as were either aboliſhed in the laſt century, or ſtill remain in force.

THE grand and fundamental maxim of all feodal tenure is this; that all lands were originally granted out by the ſovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord;* being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the uſe and poſſeſſion, according to the terms of the grant, was ſtiled the feudatory or *vaſal,* which was only another name for the tenant or holder of the lands; though, on

[d] 9 *Hen. III.*

account

account of the prejudices which we have juftly conceived againft the doctrines that were afterwards *grafted* on this fyf-tem, we now ufe the word *vafal* opprobrioufly, as fynonymous to flave or bondman (3). The manner of the grant was by words of gratuitous and pure donation, *dedi et conceffi*; which are ftill the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal inveftiture, or open and notorious delivery of poffeffion in the prefence of the other vafals; which perpetuated among them the aera of the new acquifition, at a time when the art of writing was very little known: and therefore the evidence of property was repofed in the memory of the neighbourhood; who, in cafe of a difputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but alfo by the internal tefti-mony of their own private knowlege.

BESIDES an oath of *fealty*, or profeffion of faith to the lord, which was the parent of our oath of allegiance, the vafal or tenant upon inveftiture did ufually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between thofe of the
[54] lord, who fate before him; and there profeffing that, "he "did become his *man*, from that day forth, of life and limb "and earthly honour:" and then he received a kifs from his lord [e]. Which ceremony was denominated *homagium*, or *manhood*, by the feudifts, from the ftated form of words, *devenio vefter homo* [f].

e Lit. § 85.

f It was an obfervation of Dr. Ar-buthnot, that tradition was no where preferved fo pure and incorrupt as among children,

(3) Nothing, I think, proves more ftrongly the deteftation in which the people of this country held the feudal oppreffions, than that the word *vafal*, which once fignified a feudal tenant or grantee of land, is now fynonymous to flave; and that the word *villain*, which once meant only an innocent inoffenfive bondman, has kept its relative diftance, and denotes a perfon deftitute of every moral and honourable principle, and is become one of the moft opprobrious terms in the Englifh language.

WHEN the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold; to follow, or do *suit* to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vasals of the inferior lords were bound by their fealty to attend their domestic courts baron [g], (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants,) in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow tenants: and upon this account, in all the feodal institutions both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiae*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feodal government) the right of appeal from those subordinate courts in the last resort. The military [55]
branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope. vi. 134. 8°.) It will not, I hope, be thought puerile to remark (in confirmation of this observation) that in one of our antient juvenile pastimes (the *king I am* or *basilinda* of Julius Pollux, *Onomastic. l.* 9. *c.* 7.) the ceremonies and language of feodal homage are preserved with great exactness.

g *Feud. l.* 2. *t.* 55.

At

AT the firſt introduction of feuds, as they were gratuitous, ſo alſo they were precarious and held at the *will* of the lord [h], who was then the ſole judge whether his vaſal performed his ſervices faithfully. Then they became certain for one or more *years*. Among the antient Germans they continued only from year to year: an annual diſtribution of lands being made by their leaders in their general councils or aſſemblies [i]. This was profeſſedly done, leſt their thoughts ſhould be diverted from war to agriculture; leſt the ſtrong ſhould incroach upon the poſſeſſions of the weak; and leſt luxury and avarice ſhould be encouraged by the erection of permanent houſes, and too curious an attention to convenience and the elegant ſuperfluities of life. But, when the general migration was pretty well over, and a peaceable poſſeſſion of the new acquired ſettlements had introduced new cuſtoms and manners; when the fertility of the ſoil had encouraged the ſtudy of huſbandry, and an affection for the ſpots they had cultivated began naturally to riſe in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory [k]. But ſtill feuds were not yet *hereditary*; though frequently granted, by the favour of the lord, to the children of the former poſſeſſor; till in proceſs of time it became unuſual, and was therefore thought hard, to reject the heir, if he were capable to perform the ſervices [l]: and therefore infants, women, and profeſſed monks, who were incapable of bearing arms, were alſo incapable of ſucceeding to a genuine feud. But the heir, when admitted to the feud which his anceſtor
[56] poſſeſſed, uſed generally to pay a fine or acknowlegement to the lord, in horſes, arms, money, and the like, for ſuch renewal of the feud: which was called a relief, becauſe it raiſed up and re-eſtabliſhed the inheritance, or in the words of the

[h] *Feud. l. 1. t. 1.*

[i] Thus Tacitus: (*de mor. Germ. c.* 26.) "*agri ab univerſis per vices occupantur: arva per annos mutant.*" And Cæſar yet more fully: (*de bell. Gall. l.* 6. *c.* 21.) "*Neque quiſquam agri modum certum, aut fines proprios habet; ſed magiſtratus et principes, in annos ſingulos, gentibus et cognationibus hominum qui una coierunt, quantum eis et quo loco viſum eſt, attribuunt agri, atque anno poſt alio tranſire cogunt.*"

[k] *Feud. l. 1. t. 1.*

[l] Wright. 14.

 feodal

feodal writers, "*incertam et caducam hereditatem relevabat.*" This relief was afterwards, when feuds became abſolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceaſed.

FOR in proceſs of time feuds came by degrees to be univerſally extended, beyond the life of the firſt vaſal, to his *ſons*, or perhaps to ſuch one of them as the lord ſhould name; and in this caſe the form of the donation was ſtrictly obſerved: for if a feud was given to a man and his *ſons*, all his ſons ſucceeded him in equal portions: and, as they died off, their ſhares reverted to the lord, and did not deſcend to their children, or even to their ſurviving brothers, as not being ſpecified in the donation [m]. But when ſuch a feud was given to a man and his *heirs*, in general terms, then a more extended rule of ſucceſſion took place; and when the feudatory died, his male deſcendants *in infinitum* were admitted to the ſucceſſion. When any ſuch deſcendant, who thus had ſucceeded, died, his male deſcendants were alſo admitted in the firſt place; and, in defect of them, ſuch of his male collateral kindred as were of the blood or lineage of the firſt feudatory, but no others. For this was an unalterable maxim in feodal ſucceſſion, that "none was capable of inheriting "a feud, but ſuch as was of the blood of, that is, lineally de- "ſcended from, the firſt feudatory [n]." And the deſcent, being thus confined to males, originally extended to all the males alike; all the ſons, without any diſtinction of primogeniture, ſucceeding to equal portions of the father's feud. But this being found upon many accounts inconvenient, (particularly, by dividing the ſervices, and thereby weakening the ſtrength of the feodal union) and *honorary* feuds (or titles of nobility) being now introduced, which were not of a diviſible nature, but could only be inherited by the eldeſt ſon [o]; in imitation of theſe, *military* feuds (or thoſe we are now deſcribing) began alſo in moſt countries to deſcend, according to the ſame rule of primogeniture, to the eldeſt ſon, in excluſion of all the reſt [p]. [57]

m Wright. 17.

n *Ibid* 183.

o *Feud.* 2. *t.* 55.

p Wright. 32.

OTHER

OTHER qualities of feuds were, that the feudatory could not aliene or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord [q]. For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or from his posterity who were presumed to inherit his valour, to others who might prove less able. And, as the feodal obligation was looked upon as reciprocal, the feudatory being intitled to the lord's protection, in return for his own fealty and service; therefore the lord could no more transfer his seignory or protection without consent of his vasal, than the vasal could his feud without consent of his lord [r]: it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vasal should owe subjection to a superior not of his own choosing.

THESE were the principal, and very simple, qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military persons: though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents. And by these means the feodal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "rere-fiefs") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords [s]. But this at the same time [58] demolished the antient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from

q Wright. 29. r *Ibid.* 30. s *Ibid.* 20.

the

the old fundamental rules of tenure and fucceffion; which were held no longer facred, when the feuds themfelves no longer continued to be purely military. Hence thefe tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divifions were comprehended fuch, and fuch only, of which we have before fpoken; and under that of improper or derivative feuds were comprized all fuch as do not fall within the other defcription: fuch, for inftance, as were originally bartered and fold to the feudatory for a price; fuch as were held upon bafe or lefs honourable fervices, or upon a rent, in lieu of military fervice; fuch as were in themfelves alienable, without mutual licenfe; and fuch as might defcend indifferently either to males or females. But, where a difference was not expreffed in the creation, fuch new-created feuds did in all refpects follow the nature of an original, genuine, and proper feud[t].

BUT as foon as the feodal fyftem came to be confidered in the light of a civil eftablifhment, rather than as a military plan, the ingenuity of the fame ages, which perplexed all theology with the fubtilty of fcholaftic difquifitions, and bewildered philofophy in the mazes of metaphyfical jargon, began alfo to exert it's influence on this copious and fruitful fubject: in purfuance of which, the moft refined and oppreffive confequences were drawn from what originally was a plan of fimplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different fuperftructures have been raifed: what effect it has produced on the landed property of England will appear in the following chapters.

t *Feud.* 2. *t.* 7.

CHAPTER THE FIFTH.

OF THE ANTIENT ENGLISH TENURES.

IN this chapter we ſhall take a ſhort view of the antient tenures of our Engliſh eſtates, or the manner in which lands, tenements, and hereditaments might have been holden; as the ſame ſtood in force, till the middle of the laſt century. In which we ſhall eaſily perceive, that all the particularities, all the ſeeming and real hardſhips, that attended thoſe tenures, were to be accounted for upon feodal principles and no other; being fruits of, and deduced from, the feodal policy.

ALMOST all the real property of this kingdom is by the policy of our laws ſuppoſed to be granted by, dependent upon, and *holden* of ſome ſuperior lord, by and in conſideration of certain ſervices to be rendered to the lord by the tenant or poſſeſſor of this property. The thing holden is therefore ſtiled a *tenement*, the poſſeſſors thereof *tenants*, and the manner of their poſſeſſion a *tenure*. Thus all the land in the kingdom is ſuppoſed to be holden, mediately or immediately, of the king, who is ſtiled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior perſons, became alſo lords with reſpect to thoſe inferior perſons, as they were ſtill tenants with reſpect to the king; and, thus partaking of a middle nature, were called *meſne*, or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B was ſaid to hold of

of A, and A of the king; or in other words, B held his lands immediately of A, but mediately of the king. The king therefore was ſtiled lord paramount; A was both tenant and lord, or was a meſne lord; and B was called tenant *paravail*, or the loweſt tenant; being he who was ſuppoſed to make avail, or profit, of the land[a]. In this manner are all the lands of the kingdom holden, which are in the hands of ſubjects: for according to ſir Edward Coke[b], in the law of England we have not properly *allodium*; which, we have ſeen[c], is the name by which the feudiſts abroad diſtinguiſh ſuch eſtates of the ſubject, as are not holden of any ſuperior. So that at the firſt glance we may obſerve, that our lands are either plainly feuds, or partake very ſtrongly of the feodal nature.

ALL tenures being thus derived, or ſuppoſed to be derived, from the king, thoſe that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the moſt honourable ſpecies of tenure, but at the ſame time ſubjected the tenants to greater and more burthenſome ſervices, than inferior tenures did[d]. This diſtinction ran through all the different ſorts of tenure; of which I now proceed to give an account.

I. THERE ſeem to have ſubſiſted among our anceſtors four principal ſpecies of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the ſeveral ſervices or renders, that were due to the lords from their tenants. The ſervices, in reſpect of their quality, were either *free* or *baſe* ſervices; in reſpect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* ſervices were ſuch as were not unbecoming the character of a ſoldier, or a freeman to perform; as to ſerve

[a] 2 Inſt. 296.

[b] 1 Inſt. 1.

[c] pag. 47.

[d] In the Germanic conſtitution, the electors, the biſhops, the ſecular princes, the imperial cities, &c. which hold directly from the emperor, are called the *immediate* ſtates of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hiſt. xlii. 61.

under his lord in the wars, to pay a ſum of money, and the like. *Baſe* ſervices were ſuch as were fit only for peaſants, or perſons of a ſervile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* ſervices, whether free or baſe, were ſuch as were ſtinted in quantity, and could not be exceeded on any pretence; as, to pay a ſtated annual rent, or to plough ſuch a field for three days. The *uncertain* depended upon unknown contingencies; as, to do military ſervice in perſon, or pay an aſſeſſment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free ſervices: or to do whatever the lord ſhould command; which is a baſe or villein ſervice.

FROM the various combinations of theſe ſervices have ariſen the four kinds of lay tenure which ſubſiſted in England, till the middle of the laſt century; and three of which ſubſiſt to this day. Of theſe Bracton (who wrote under Henry the third) ſeems to give the cleareſt and moſt compendious account, of any author antient or modern [e]; of which the following is the outline or abſtract [f]. "Tenements are of two kinds, *frank-tenement*, and *villenage*. "And, of frank-tenements, ſome are held freely in con-"ſideration of homage and *knight-ſervice;* others in *free-"ſocage* with the ſervice of fealty only." And again [g], "of "villenages ſome are pure, and others privileged. He that "holds in *pure villenage* ſhall do whatſoever is commanded "him, and always be bound to an uncertain ſervice. The "other kind of villenage is called *villein ſocage;* and theſe "villein-ſocmen do villein ſervices, but ſuch as are certain "and determined." Of which the ſenſe ſeems to be as follows: firſt, where the ſervice was *free* but *uncertain*, as military ſervice with homage, that tenure was called the tenure in

[e] *l.* 4. *tr.* 1. *c.* 28.

[f] *Tenementorum aliud liberum, aliud villenagium. Item, libererum aliud teneur libere pro bomagio et ſervitio militari; aliud in libero ſocagio cum fidelitate tantum.* § 1.

[g] *Villenagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei praeceptum fuerit, et ſemper tenebitur ad incerta. Aliud genus villenagii dicitur villanum ſocagium; et hujuſmodi villani ſocmanni—villana faciunt ſervitia, ſed certa et determinata.* § 5.

chivalry,

chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, *&c.* that tenure was called *liberum socagium*, or free socage. These were the only *free* holdings or tenements; the others were *villenous* or servile: as, thirdly, where the service was *base* in it's nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was *base* in it's nature, but reduced to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum;* or it might be still called socage (from the *certainty* of it's services) but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage.

I. THE first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, called in Latin *servitium militare*, and in law-French *chivalry*, or *service de chivaler*, answering to the *fief d'haubert* of the Normans [h], which name is expressly given it by the Mirrour [i]. This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the general effect of the feodal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the measure of which in 3 Edw. I, was estimated at twelve ploughlands [k], and it's value (though it varied with the times [l]) in the reigns of Edward I. and Edward II [m], was stated at 20 *l. per annum* (1). And he who held this pro-

[h] Spelm. *Gloss.* 219.

[i] c. 2. § 27.

[k] *Pasch.* 3 Edw. I. Co. Litt. 69.

[l] 2 Inst. 596.

[m] Stat. Westm. 1. c. 36. Stat. *de milit.* 1 Edw. II. Co. Litt. 69.

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(1) Mr. Selden contends, that a knight's fee did not consist of land of a fixed extent or value, but was as much as the king was pleased to grant, upon the condition of having the service of one knight. *Tit. of Hon.* p. 2. c. 5. s. 17 & 26. This is more probable; besides, it cannot be supposed, that the same quantity of land was every where of the same value.

portion of land (or a whole fee) by knight-ſervice, was bound to attend his lord to the wars for forty days in every year, if called upon [n]: which attendance was his *reditus* or return, his rent or ſervice, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to at-
[63] tend twenty days, and ſo in proportion [o]. And there is reaſon to apprehend, that this ſervice was the whole that our anceſtors meant to ſubject themſelves to; the other fruits and conſequences of this tenure being fraudulently ſuperinduced, as the regular (though unforeſeen) appendages of the feodal ſyſtem.

THIS tenure of knight-ſervice had all the marks of a ſtrict and regular feud: it was granted by words of pure donation, *dedi et conceſſi* [p]; was transferred by inveſtiture or delivering corporal poſſeſſion of the land, uſually called livery of ſeiſin; and was perfected by homage and fealty. It alſo drew after it theſe ſeven fruits and conſequences, as inſeparably incident to the tenure in chivalry; *viz.* aids, relief, primer ſeiſin, wardſhip, marriage, fines for alienation, and eſcheat: all which I ſhall endeavour to explain, and ſhew to be of feodal original.

1. AIDS were originally mere benevolences granted by the tenant to his lord, in times of difficulty and diſtreſs [q]; but in proceſs of time they grew to be conſidered as a matter of right, and not of diſcretion. Theſe aids were principally three: firſt, to ranſom the lord's perſon, if taken priſoner; a neceſſary conſequence of the feodal attachment and fidelity: inſomuch that the neglect of doing it, whenever it was in the vaſal's power, was by the ſtrict rigour of the feodal law an abſolute forfeiture of his eſtate [r]. Secondly, to make the lord's eldeſt ſon a knight; a matter that was formerly attended with great ceremony, pomp, and expenſe. This aid could

[n] See writs for this purpoſe in *Memorand. Scacch.* 36. prefixed to Maynard's yearbook. Edw. II.

[o] Litt. § 95.

[p] Co. Litt. 9.

[q] *Auxilia fiunt de gratia et non de jure,—cum dependeant ex gratia tenentium et non ad voluntatem dominorum.* Bracton. *l.* 2. *tr.* 1. *c.* 16. § 8.

[r] *Feud. l.* 2. *t.* 24.

not

not be demanded till the heir was fifteen years old, or capable of bearing arms [r]: the intention of it being to breed up the eldest son and heir apparent of the seignory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughter's portions were in those days extremely slender; few lords being able to save much out of [64] their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms: nor, by the nature of their tenure, could they charge their lands with this, or any other incumbrances. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants [s]. And one cannot but observe, in this particular, the great resemblance which the lord and vasal of the feodal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; *viz.* to marry the patron's daughter; to pay his debts; and to redeem his person from captivity [t].

BUT besides these antient feodal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts, (probably in imitation of the Romans,) and aids to enable him to pay aids or reliefs to his superior lord; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. To prevent this abuse, king John's *magna carta* [u] ordained, that no aids be taken by the king without consent of parliament, nor in any wise by

[r] 2 Inst. 233.

[s] Philips's life of Pole I. 223.

[t] *Erat autem haec inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent; in aeris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent.* Paul. Manutius *de senatu Romano. c.* 1.

[u] *cap.* 12, 15.

inferior

inferior lords, ſave only the three antient ones above-mentioned. But this proviſion was omitted in Henry III's charter, and the ſame oppreſſions were continued till the 25 Edw. I, when the ſtatute called *confirmatio chartarum* was enacted; which in this reſpect revived king John's charter, by ordaining that none but the antient aids ſhould be taken. But though the ſpecies of aids was thus reſtrained, yet the quantity
[65] of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords ſhould be reaſonable [w]; and that the aids taken by the king of his tenants *in capite* ſhould be ſettled by parliament [x]. But they were never completely aſcertained and adjuſted till the ſtatute Weſtm. 1. 3 Edw. I. c. 36. which fixed the aids of inferior lords at twenty ſhillings, or the ſuppoſed twentieth part of the annual value of every knight's fee, for making the eleſt ſon a knight, or marrying the eldeſt daughter; and the ſame was done with regard to the king's tenants *in capite* by ſtatute 25 Edw. III. c. 11. The other aid, for ranſom of the lord's perſon, being not in it's nature capable of any certainty, was therefore never aſcertained.

2. RELIEF, *relevium*, was before mentioned as incident to every feodal tenure, by way of fine or compoſition with the lord for taking up the eſtate, which was lapſed or fallen in by the death of the laſt tenant. But, though reliefs had their original while feuds were only life-eſtates, yet they continued after feuds became hereditary; and were therefore looked upon, very juſtly, as one of the greateſt grievances of tenure: eſpecially when, at the firſt, they were merely arbitrary and at the will of the lord; ſo that, if he pleaſed to demand an exorbitant relief, it was in effect to diſinherit the heir [y]. The Engliſh ill brooked this conſequence of their new adopted policy; and therefore William the conqueror by his laws [z] *aſcertained* the relief, by directing (in imitation of the Daniſh heriots) that a certain quantity of arms, and habiliments of war, ſhould be paid by the earls, barons, and

w *cap.* 15.
x *Ibid.* 14.
y Wright. 99.
z *c.* 22, 23, 24.

vavaſours

vavafours refpectively; and if the latter had no arms, they fhould pay 100 *s.* William Rufus broke through this compofition, and again demanded arbitrary uncertain reliefs, as due by the feodal laws: thereby in effect obliging every heir to new-purchafe or *redeem* his land [a]: but his brother Henry I, by the charter before mentioned, reftored his father's law; and ordained, that the relief to be paid fhould be according to the law fo eftablifhed, and not an arbitrary redemption [b]. [66]
But afterwards, when, by an ordinance in 27 Hen. II. called the affife of arms, it was provided that every man's armour fhould defcend to his heir, for defence of the realm; and it thereby became impracticable to pay thefe acknowlegements in arms, according to the laws of the conqueror, the compofition was univerfally accepted of 100 *s.* for every knight's fee; as we find it ever after eftablifhed [c]. But it muft be remembered, that this relief was only then payable, if the heir at the death of his anceftor had attained his full age of one and twenty years.

3. PRIMER *feifin* was a feodal burthen, only incident to the king's tenants *in capite*, and not to thofe who held of inferior or mefne lords. It was a right which the king had, when any of his tenants *in capite* died feifed of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate poffeffion; and half a year's profits, if the lands were in reverfion expectant on an eftate for life [d]. This feems to be little more than an additional relief, but grounded upon this feodal reafon; that, by the antient law of feuds, immediately upon a death of a vafal the fuperior was entitled to enter and take feifin or poffeffion of the land, by way of protection againft intruders, till the heir appeared to claim it, and receive inveftiture: during which interval the lord was entitled to take the profits; and, unlefs the heir claimed within a year and day, it was by the ftrict law a forfeiture [e].

[a] 2 Roll. Abr. 514.

[b] "*Haeres non redimet terram fuam "ficut faciebat tempore fratris mei, fed "legitima et jufta relevatione relevabit "eam.*" (*Text. Roffens. cap.* 34.)

[c] Glanv. *l.* 9. *c.* 4. Litt. § 112.

[d] Co. Litt. 77.

[e] *Feud. l.* 2. *t.* 24.

This

This practice however seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but, as to the king's tenures *in capite*, the *prima seisina* was expressly declared, under Henry III and Edward II, to belong to the king by prerogative, in contradistinction to other lords [f]. The king was entitled to enter and receive the whole profits of the land, till livery was sued; which suit
[67] being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feodal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land [g]. And this afterwards gave a handle to the popes, who claimed to be feodal lords of the church, to claim in like manner from every clergyman in England, the first year's profits of his benefice, by way of *primitiae*, or first fruits.

4. THESE payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female [h], the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir female of fourteen: yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1. 3 Edw. I. c. 22. the two additional years being given by the legislature for no other reason but merely to benefit the lord [i].

THIS wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were

f Stat. Marlbr. c. 16. 17 Edw. II. c. 3.
g Staundf. Prerog. 12.
h Litt. § 103.
i *Ibid.*

arbitrary,

arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feodal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit person to supply the infant's services, till he should be of age to perform them himself (2). And, if we consider the feud in it's [68] original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I. before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

THE wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

WHEN the male heir arrived to the age of twenty-one, or the heir-female to that of sixteen, they might sue out their

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(2) If an infant tenant by knight's service was created a knight, the king was no longer intitled to the wardship of his person, nor to the value of his marriage. Sir John Radcliff's case, *Plow.* 267. And the reason there assigned is, that "when he is made a knight "by the king, who is the chief captain of all chivalry, or by some "other great captain assigned by the king for that purpose, he is "thereby allowed and admitted to be able to perform knight's "service; and then his body ought not to be in ward, because his "imbecility ceases, and *cessante causâ, cessabit effectus.*"

 livery

livery or *ousterlemain*[k]; that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *magna carta*[l]. However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins[m]. In order to ascertain the profits that arose to the crown by these first fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county[n], commonly called an *inquisitio post mortem;* which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age his heir was; thereby to
[69] ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII, that by colour of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto[o]. And, afterwards, a court of wards and liveries was erected[p], for conducting the same inquiries in a more solemn and legal manner.

WHEN the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For, in those heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance;

k Co. Litt. 77.
l 9 Hen. 3. c. 3.
m Co. Litt. 77.
n Hoveden. *sub Ric. I.*
o 4 Inst. 198.
p Stat. 32 Hen. VIII. c. 46.

which

which ceremony, as was formerly hinted [q], is supposed to have been the original of the feodal knighthood [r]. This prerogative, of compelling the king's vasals(3) to be knighted, or to pay a fine, as expresly recognized in parliament, by the statute *de militibus*, 1 Edw. II; was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI and queen Elizabeth; but yet was the occasion of heavy murmurs when exerted by Charles I: among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion, of prerogative. However, among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this un- [70]
doubted flower of the crown, and it was accordingly abolished by statute 16 Car. I. c. 20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage*, (*maritagium*, as contradistinguished from *matrimonium*) which in it's feodal sense signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement*, or inequality: which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian [s]; that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such

[q] Vol. I. pag. 404.

[r] "*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto frameaque juvenem ornant. Haec apud illos toga, hic primus juventae honos: ante hoc domus pars videntur; mox reipublicae.*" *De mor. Germ. cap.* 13.

[s] Litt. § 110.

(3) I do not find that this prerogative was confined to the king's tenants: lord Coke does not make that distinction in his commentary on the stat. *de milit.* 2 Inst. 593. Nor is the power of the commissioners limited to the king's tenants in the commissions issued by Edw. VI. and queen Elizabeth; which see in 15 *Rym. Foed.* 124, and 493. See 16 *Car. I. c.* 20. 2 *Rushw.* 70; and 1 vol. p. 404.

an alliance[t]: and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*[u] (4). This seems to have been one of the greatest hardships of our antient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy[w]: but no tolerable pretence could be assigned why the lord should have the *sale*, or *value* of the marriage. Nor indeed is this claim of strictly feodal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards[x]; which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry the first, he engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not married to his enemy. But this, among other beneficial parts
[71] of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by king John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract[y]; or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua*[z]. But these provisions in behalf of the relations were omitted in the charter of Henry III: wherein[a] the clause stands merely thus "*haeredes maritentur absque disparaga-*

t Stat. Mert. c. 6. Co. Litt. 82.
u Litt. § 110.
w Bract. *l.* 2. *c.* 37. § 6.
x Gr. Cust. 95.
y *cap.* 6. *edit. Oxon.*
z *cap.* 3. *ibid.*
a *cap.* 6.

(4) That is, after a suitable match had been tendered by the lord; but female heirs were not subject to the *duplex valor maritagii.* Co. Litt. 82. b.

tione:"

tione:" meaning certainly, by *haeredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage [b] of heirs male; and as Glanvil [c] exprefsly confines it to heirs female. But the king and his great lords thenceforward took a handle (from the ambiguity of this expreffion) to claim them both, *five fit mafculus five foemina*, as Bracton more than once expreffes it [d]: and alfo, as nothing but difparagement was reftrained by *magna carta*, they thought themfelves at liberty to make all other advantages that they could [e]. And afterwards this right, of felling the ward in marriage or elfe receiving the price or value of it, was exprefsly declared by the ftatute of Merton [f]; which is the firft direct mention of it that I have met with, in our own or any other law (5).

b The words *maritare* and *maritagium* feem *ex vi termini* to denote the providing of an *hufband*.

c *l.* 9. *c.* 9. & 12. & *l.* 9. *c.* 4.

d *l.* 2. *c.* 38. § 1.

e Wright. 97.

f 20 Hen. III. c. 6.

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(5) What fruitful fources of revenue thefe wardfhips and marriages of the tenants, who held lands by knight's fervice, were to the crown, will appear from the two following inftances collected among others by lord Lyttleton, Hift. Hen. II. 2 vol. 296.

" John earl of Lincoln gave Henry the third 3000 marks " to have the marriage of Richard de Clare, for the benefit of " Matilda his eldeft daughter; and Simon de Montford gave the " fame king 10,000 marks to have the cuftody of the lands and " heir of Gilbert de Unfranville, with the heir's marriage, a fum " equivalent to a hundred thoufand pounds at prefent." In this cafe the eftate muft have been large, the minor young, and the alliance honourable. For as Mr. Hargrave informs us, who has well defcribed this fpecies of guardianfhip, " the guardian in chivalry " was not accountable for the profits made of the infant's land " during the wardfhip, but received them for his own private emo- " lument, fubject only to the bare maintenance of the infant. " And this guardianfhip, being deemed more an intereft for the " profit of the guardian, than a truft for the benefit of the ward, " was faleable and transferrable, like the ordinary fubjects of pro- " perty, to the beft bidder; and if not difpofed of, was tranf- " miffible to the lord's perfonal reprefentatives. Thus the cuftody " of

6. ANOTHER attendant or conſequence of tenure by knight-ſervice was that of *fines* due to the lord for every *alienation*, whenever the tenant had occaſion to make over his land to another. This depended on the nature of the feodal connexion; it not being reaſonable nor allowed, as we have before ſeen, that a feudatory ſhould transfer his lord's gift to another, and ſubſtitute a new tenant to do the ſervice in his own ſtead, without the conſent of the lord: and, as the feodal obligation was conſidered as reciprocal, the lord alſo could
[72] not alienate his ſeignory without the conſent of his tenant, which conſent of his was called an *attornment*. This reſtraint upon the lords ſoon wore away; that upon the tenants continued longer. For, when every thing came in proceſs of time to be bought and ſold, the lords would not grant a licence to their tenant, to aliene, without a fine being paid; apprehending that, if it was reaſonable for the heir to pay a fine or relief on the renovation of his paternal eſtate, it was much more reaſonable that a ſtranger ſhould make the ſame acknowlegement on his admiſſion to a newly purchaſed feud. With us in England, theſe fines ſeem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence: but, as to common perſons, they were at liberty, by *magna carta*[g], and the ſtatute of *quia emptores*[h], (if not earlier) to aliene the whole of their eſtate, to

[g] *cap.* 32. [h] 18 Edw. I. c. 1.

"of the infant's perſon, as well as the care of his eſtate, might "devolve upon the moſt perfect ſtranger to the infant; one "prompted by every pecuniary motive to abuſe the delicate and "important truſt of education, without any ties of blood or regard "to counteract the temptations of intereſt, or any ſufficient au-"thority to reſtrain him from yielding to their influence." *Co. Litt.* 88. n. 11.

One cannot read this without aſtoniſhment, that ſuch ſhould continue to be the condition of this country till the year 1660, which, from the extermination of theſe feudal oppreſſions, ought to be regarded as a memorable æra in the hiſtory of our law and liberty.

be

be holden of the ſame lord, as they themſelves held it of before. But the king's tenants *in capite*, not being included under the general words of theſe ſtatutes, could not aliene without a licence: for if they did, it was in antient ſtrictneſs an abſolute forfeiture of the land [i]; though ſome have imagined otherwiſe. But this ſeverity was mitigated by the ſtatute 1 Edw. III. c. 12. which ordained, that in ſuch caſe the lands ſhould not be forfeited, but a reaſonable fine be paid to the king. Upon which ſtatute it was ſettled, that one third of the yearly value ſhould be paid for a licence of alienation; but, if the tenant preſumed to aliene without a licence, a full year's value ſhould be paid [k].

7. THE laſt conſequence of tenure in chivalry was *eſcheat*; which is the determination of the tenure, or diſſolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and ſtained by commiſſion of treaſon or felony; whereby every inheritable quality was entirely blotted out and aboliſhed. In ſuch caſes the land eſcheated, or fell back, to the lord of the fee [l]; that is, the tenure was determined by breach of the original condition, expreſſed or implied in [73] the feodal donation. In the one caſe, there were no heirs ſubſiſting of the blood of the firſt feudatory or purchaſer, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, ſhewed that he was no longer to be truſted as a vaſal, having forgotten his duty as a ſubject; and therefore forfeited his feud, which he held under the implied condition that he ſhould not be a traitor or a felon. The conſequence of which in both caſes was, that the gift, being determined, reſulted back to the lord who gave it [m].

THESE were the principal qualities, fruits, and conſequences of the tenure by knight-ſervice: a tenure, by which

i 2 Inſt. 66.
k *Ibid.* 67.
l Co. Litt. 13.
m *Feud. l.* 2. *t.* 86.

the greateſt part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the laſt century (6); and which was created, as ſir Edward Coke expreſsly teſtifies [n], for a military purpoſe; *viz.* for defence of the realm by the king's own principal ſubjects, which was judged to be much better than to truſt to hirelings or foreigners. The deſcription here given is that of knight-ſervice proper; which was to attend the king in his wars. There were alſo ſome other ſpecies of knight-ſervice; ſo called, though improperly, becauſe the ſervice or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-ſervice proper, and becauſe they were attended with ſimilar fruits and conſequences. Such was the tenure by *grand ſerjeanty per magnum ſervitium*, whereby the tenant was bound, inſtead of ſerving the king *generally* in his wars, to do ſome ſpecial honorary ſervice to the king in perſon; as to carry his banner, his ſword, or the like; or to be his butler, champion, or other officer, at his coronation [o]. It was in moſt other reſpects like knight-ſervice [p]; only he was not bound to pay aid [q], or eſcuage [r]; and, when tenant by knight-ſervice paid five pounds for a
[74] relief on every knight's fee, tenant by grand ſerjeanty paid one year's value of his land, were it much or little [s]. Tenure by *cornage*, which was, to wind a horn when the Scots or other enemies entered the land, in order to warn the king's ſubjects, was (like other ſervices of the ſame nature) a ſpecies of grand ſerjeanty [t].

THESE ſervices, both of chivalry and grand ſerjeanty, were all perſonal, and uncertain as to their quantity or duration. But, the perſonal attendance in knight-ſervice growing trou-

n 4 Inſt. 192.
o Litt. § 153.
p *Ibid.* § 158.
q 2 Inſt. 233.
r Litt. § 158.
s *Ibid.* § 154.
t *Ibid.* § 156.

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(6) I do not know that we are any where told what proportion, in quantity, the military tenure bore to the ſocage tenure.

 bleſome

blesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination for money (7): and, in like manner, it was called, in our Norman French, *escuage*; being indeed a pecuniary, instead of a military, service. The first time this appears to have been taken was in the 5 Hen. II, on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our antient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops: and these assessments, in the time of Henry II, seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and king John was obliged to consent, by his *magna carta*, that no scutage should be imposed without consent of parliament [u]. But this clause was omitted in his son Henry III's charter; where we only find [w], that scutages or escuage should be taken as they were used to be taken in the time of Henry II: that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I. c. 5 & 6. [75] and many subsequent statutes [x] it was again provided, that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parlia-

u *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri. cap.* 12.

w *cap.* 37.

x See Vol. I. pag. 140.

(7) But Lyttleton, Coke, and Bracton, render it the service of the shield, *i. e.* of arms, being a compensation for actual service. *Co. Litt.* 68. *b.*

 ment;

ment[y]; ſuch ſcutages being indeed the groundwork of all ſucceeding ſubſidies, and the land-tax of later times.

SINCE therefore eſcuage differed from knight-ſervice in nothing, but as a compenſation differs from actual ſervice, knight-ſervice is frequently confounded with it. And thus Littleton[z] muſt be underſtood, when he tells us, that tenant by homage, fealty, and eſcuage, was tenant by knight-ſervice: that is, that this tenure (being ſubſervient to the military policy of the nation) was reſpected[a] as a tenure in chivalry[b]. But as the actual ſervice was uncertain, and depended upon emergences, ſo it was neceſſary that this pecuniary compenſation ſhould be equally uncertain, and depend on the aſſeſſments of the legiſlature ſuited to thoſe emergences. For had the eſcuage been a ſettled invariable ſum payable at certain times, it had been neither more nor leſs than a mere pecuniary rent: and the tenure, inſtead of knight-ſervice, would have then been of another kind, called ſocage[c], of which we ſhall ſpeak in the next chapter.

FOR the preſent I have only to obſerve, that by the degenerating of knight-ſervice, or perſonal military duty, into eſcuage, or pecuniary aſſeſſments, all the advantages (either promiſed or real) of the feodal conſtitution were deſtroyed, and nothing but the hardſhips remained. Inſtead of forming a national militia compoſed of barons, knights, and gentlemen, bound by their intereſt, their honour, and their oaths, to defend their king and country, the whole of this ſyſtem of tenures now tended to nothing elſe, but a wretched means of
[76] raiſing money to pay an army of occaſional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens, which (in conſequence of the fiction adopted after the conqueſt) were introduced and laid upon them by the ſubtlety and fineſſe of the Norman lawyers. For, beſides the ſcutages to which they were liable in defect of perſonal attendance, which however

y Old Ten. *tit. Eſcuage.*
z § 103.
a Wright. 122.
b *Pro feodo militari reputatur.* Flet. *l.* 2. *c.* 14. § 7.
c Litt. § 97. 120.

were

were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin*; and, if under age, of the whole of his estate during infancy. And then, as sir Thomas Smith[d] very feelingly complains, "when he came to his own, after "he was out of *wardship*, his woods decayed, houses fallen "down, stock wasted and gone, lands let forth and plough- "ed to be barren," to reduce him still farther, he was yet to pay half a year's profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence* of *alienation*.

A SLAVERY so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of it's freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of king James I consented[e], in consideration of a proper equivalent, to abolish them all; though the plan proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution,
for removing the feodal grievance of heritable jurisdictions [77]
in Scotland[f], which has since been pursued and effected by the statute 20 Geo. II. c. 43[g]. King James's plan for ex-

d Commonw. l. 3. c. 5.

e 4 Inst. 202.

f Dalrymp. of feuds. 292.

g By another statute of the same year (20 Geo. II. c. 50.) the tenure of *wardholding* (equivalent to the knight-service of England) is for ever abolished in Scotland.

changing

changing our military tenures feems to have been nearly the fame as that which has been fince purfued; only with this difference, that, by way of compenfation for the lofs which the crown and other lords would fuftain, an annual feefarm rent was to have been fettled and infeparably annexed to the crown, and affured to the inferior lords, payable out of every knight's fee within their refpective feignories. An expedient, feemingly much better than the hereditary excife, which was afterwards made the principal equivalent for thefe conceffions. For at length the military tenures, with all their heavy appendages (having during the ufurpation been difcontinued) were deftroyed at one blow by the ftatute 12 Car. II. c. 24. which enacts, "that the court of wards and liveries, "and all wardfhips, liveries, primer feifins, and oufter-"lemains, values and forfeitures of marriages, by reafon of "any tenure of the king or others, be totally taken away. "And that all fines for alienations, tenures by homage, "knights-fervice, and efcuage, and alfo aids for marrying "the daughter or knighting the fon, and all tenures of the "king *in capite*, be likewife taken away(8). And that all "forts of tenures, held of the king or others, be turned into

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(8) Both Mr. Madox and Mr. Hargrave have taken notice of this inaccuracy in the title and the body of the act, *viz.* of taking away tenures *in capite*; (*Mad. Bar. Ang.* 238. *Co. Litt.* 108. n. 5.) for tenure *in capite* fignifies nothing more than that the king is the immediate lord of the land-owner; and the land might have been either of military or focage tenure. The fame incorrect language was held by the fpeaker of the houfe of commons in his pedantic addrefs to the throne upon prefenting this bill. "Royal fir, your tenures "*in capite* are not only turned into a tenure in focage, (though that "alone will for ever give your majefty a juft right and title to the "labour of our ploughs, and the fweat of our brows,) but they are "likewife turned into a tenure *in corde*. What your majefty had "before in your court of wards, you will be fure to find it here-"after in the exchequer of your people's hearts." *Journ. Dom. Proc.* 11 vol. 234.

"free

"free and common ſocage; ſave only tenures in frankalmoign, "copyholds, and the honorary ſervices (without the ſlaviſh "part) of grand ſerjeanty." A ſtatute, which was a greater acquiſition to the civil property of this kingdom than even *magna carta* itſelf: ſince that only pruned the luxuriances that had grown out of the military tenures, and thereby preſerved them in vigour; but the ſtatute of king Charles extirpated the whole, and demoliſhed both root and branches.

CHAPTER THE SIXTH.

OF THE MODERN ENGLISH TENURES.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppreffive or military part of the feodal conftitution was happily done away, yet we are not to imagine that the conftitution itfelf was utterly laid afide, and a new one introduced in it's room: fince by the ftatute 12 Car. II. the tenures of focage and frankalmoign, the honorary fervices of grand ferjeanty, and the tenure by copy of court roll were referved; nay all tenures in general, except frankalmoign, grand ferjeanty, and copyhold, were reduced to one general fpecies of tenure, then well known and fubfifting, called free and common focage. And this, being fprung from the fame feodal original as the reft, demonftrates the neceffity of fully contemplating that antient fyftem; fince it is that alone to which we can recur, to explain any feeming or real difficulties, that may arife in our prefent mode of tenure.

THE military tenure, or that by knight-fervice, confifted of what were reputed the moft free and honourable fervices, but which in their nature were unavoidably uncertain in refpect to the time of their performance. The fecond fpecies of tenure, or *free-focage*, confifted alfo of free and honourable fervices; but fuch as were liquidated and reduced to an abfolute certainty. And this tenure not only fubfifts to this day, but has in a manner abforbed and fwallowed up (fince the

ftatute

ſtatute of Charles the ſecond) almoſt every other ſpecies of tenure. And to this we are next to proceed.

II. SOCAGE, in it's moſt general and extenſive ſignification, ſeems to denote a tenure by any certain and determinate ſervice. And in this ſenſe it is by our antient writers conſtantly put in oppoſition to chivalry, or knight-ſervice, where the render was precarious and uncertain. Thus Bracton[a]; if a man holds by a rent in money, without any eſcuage or ſerjeanty, "*id tenementum dici poteſt ſocagium:*" but if you add thereto any royal ſervice, or eſcuage to any, the ſmalleſt, amount, "*illud dici poterit feodum militare.*" So too the author of Fleta[b]; "*ex donationibus, ſervitia militaria vel magnae* "*ſerjantiae non continentibus, oritur nobis quoddam nomen gene-* "*rale, quod eſt ſocagium.*" Littleton alſo[c] defines it to be, where the tenant holds his tenement of the lord by any *certain* ſervice, in lieu of all other ſervices; ſo that they be not ſervices of chivalry, or knight-ſervice. And therefore afterwards[d] he tells us, that whatſoever is not tenure in chivalry is tenure in ſocage: in like manner as it is defined by Finch[e], a tenure to be done out of war. The ſervice muſt therefore be certain, in order to denominate it ſocage; as to hold by fealty and 20 *s.* rent; or, by homage, fealty, and 20 *s.* rent; or, by homage and fealty without rent; or, by fealty and certain corporal ſervice, as ploughing the lord's land for three days; or, by fealty only without any other ſervice: for all theſe are tenures in ſocage[f].

BUT ſocage, as was hinted in the laſt chapter, is of two ſorts: *free*-ſocage, where the ſervices are not only certain, but honourable: and *villein*-ſocage, where the ſervices, though certain, are of a baſer nature. Such as hold by the former tenure are called in Glanvil[g], and other ſubſequent authors, by the name of *liberi ſokemanni*, or tenants in free-ſocage. Of this tenure we are firſt to ſpeak; and this, both in the na-

[a] *l.* 2. *c.* 16. § 9.
[b] *l.* 3. *c.* 14. § 9.
[c] § 117.
[d] § 118.
[e] L. 147.
[f] Litt. § 117, 118, 119.
[g] *l.* 3. *c.* 7.

ture

ture of it's service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of the word [h]: who derives it from the Saxon appellation *soc*, which signifies liberty or privilege, and, being joined to a usual termination, is called *socage*, in Latin *socagium*; signifying thereby a free or privileged tenure [i]. This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word denoting (as they tell us) a plough: for that in antient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of it's original, it still retains the name of a socage or plough-service [k]. But this by no means agrees with what Littleton himself tells us [l], that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original, (as escuage, which, while it remained uncertain, was equivalent to knight-service,) the instant they were reduced to a certainty changed both their name and nature, and were called socage [m]. It was the *certainty* therefore that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the name of *fraunke ferme* [n], tells us, that they are, "lands "and tenements, whereof the nature of the fee is changed "by feoffment *out of chivalry* for *certain* yearly services, and "in respect whereof neither homage, ward, marriage, nor

[h] Gavelk. 138.

[i] In like manner Skene in his exposition of the Scots' law, title *socage*, tells us, that it is 'ane kind of holding of 'lands, quhen ony man is infeft *freely*,' &c.

[k] Litt. § 119.

[l] § 118.

[m] Litt. § 98. 120.

[n] c. 66.

"relief

"relief can be demanded." Which leads us alſo to another obſervation, that if ſocage tenures were of ſuch baſe and ſervile original, it is hard to account for the very great immunities which the tenants of them always enjoyed; ſo highly ſuperior to thoſe of the tenants by chivalry, that it was thought, in the reigns of both Edward I and Charles II, a point of the utmoſt importance and value to the tenants, to reduce the tenure by knight-ſervice to *fraunke ferme* or tenure by ſocage. We may therefore, I think, fairly conclude in favour of Somner's etymology, and the liberal extraction of the tenure in free ſocage, againſt the authority even of Littleton himſelf (1).

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(1) The learned Judge has done Mr. Somner the honour of adopting his derivation of *ſocage*, which Mr. Somner himſelf boaſts of as a new diſcovery with no little pride and exultation, as appears from the following ſentence: *Derivatio forte hæc nova et noſtratibus adhuc inaudita, qui, à ſoc quatenus vel aratrum vel ſaltem vomerem ſignat, vocem derivare ſatagunt. Quam male tamen, eorum veniâ, fuſius a me jam monitum in tractatu de gavelkind, cap.* 4. Somn. Gloſſ. *Soca.* But notwithſtanding this *unheard-of* derivation has found an able defender in the learned Commentator, the editor is obliged to prefer the old derivation for the following reaſons:—Our moſt ancient writers derive it from *ſoca* or *ſoccus*, a plough; and *ſock*, in ſome parts of the north of England, is the common name for a plough-ſhare to this day. The following deſcription of *ſocage* is given by Bracton; *dici poterit ſocagium à ſocco, et inde tenentes ſockmanni, eo quod deputati ſunt, ut videtur, tantummodo ad culturam, et quorum cuſtodia et maritagia ad propinquiores parentes jure ſanguinis pertinebant.* (C. 35.) This is not only adopted by Littleton and lord Coke, (*Co. Litt.* 86.) who ſay, that *ſocagium eſt ſervitium ſocæ*, which is alſo the interpretation given by Ducange, (*voc.* Soc.) but ſir Henry Spelman, whoſe authority is high in feudal antiquities, teſtifies, that *feudum ignobile, plebeium vulgare Gall. fief roturier nobili opponitur, et propriè dicimus, quod ignobilibus et ruſticis competit, nullo* feudali privilegio *ornatum, nos ſoccagium dicimus.* Gloſſ. voc. *Feod.* And *ſoccagium* he explains by *Gall. roture, fief roturier. Heretages en roture.* (Ib. voc. *Soc.*)

In a law of Edward the Confeſſor, the ſokeman and villain are claſſed together: *Manbote de villano et ſokeman xii oras, de liberis autem hominibus iii marcas.* (C. 12.) If we conſider the nature of

ſocage

TAKING this then to be the meaning of the word, it ſeems probable that the ſocage tenures were the relics of Saxon liberty; retained by ſuch perſons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but at the ſame time more burthenſome, tenure of knight-ſervice. This is pecu-

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ſocage tenure, we ſhall ſee no reaſon why it ſhould have the pre-eminence of the appellation of a privileged poſſeſſion.

The ſervices of military tenure were not left, as ſuggeſted by the learned Judge in the preceding page, *to the arbitrary calls of the lord*, for though it was uncertain when the king would go to war, yet the tenant was *certain* that he could only be compelled to ſerve forty days in the year; the ſervice therefore was as certain in it's extent as that of ſocage; and the ſokeman likewiſe could not know beforehand when he would be called upon to plough the land, or to perform other ſervile offices, for the lord. The *milites* are every where diſtinguiſhed from the *ſokemanni*, and the wiſdom of the feudal polity appears in no view more ſtrongly than in this; *viz.* that whilſt it ſecured a powerful army of warriors, it was not unprovident of the culture of the lands, and the domeſtic concerns of the country. But honour was the invigorating principle of that ſyſtem, and it cannot be imagined that thoſe who never graſped a ſword, nor buckled on a coat of mail, ſhould enjoy privileges and diſtinctions denied to the barons and milites, the companions of their ſovereign. The ſokemanni were indebted only to their own meanneſs and inſignificance for their peculiar immunities. The king or lord had the profits of the military tenant's eſtate, during his nonage, in order to retain a ſubſtitute with accoutrements, and in a ſtate ſuitable to the condition of his tenant; and at the ſame time he took care, that the minor was inſtructed in the martial accompliſhments of the age. But they diſdained to ſuperintend the education of the ſokemanni; and as they had nothing to apprehend from their oppoſition, and could expect no acceſſion of ſtrength from their connections, their marriages therefore were an object of indifference to them. Hence when the age of chivalry was gone, and nothing but it's ſlavery remained, by no uncommon viciſſitude in the affairs of men, the ſokemanni derived from their obſcurity that independence and liberty, which they have tranſmitted to poſterity, and which we are now proud to inherit.

 liarly

liarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowleged to be a ſpecies of ſocage tenure [o]; the preſervation whereof inviolate from the innovations of the Norman conqueror is a fact univerſally known. And thoſe who thus preſerved their liberties were ſaid to hold in *free* and *common* ſocage.

As therefore the grand criterion and diſtinguiſhing mark of this ſpecies of tenure are the having it's renders or ſervices aſcertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit ſerjeanty*, tenure in *burgage*, and *gavelkind*.

WE may remember, that by the ſtatute 12 Car. II. grand ſerjeanty is not itſelf totally aboliſhed, but only the ſlaviſh appendages belonging to it: for the honorary ſervices (ſuch as carrying the king's ſword or banner, officiating as his butler, carver, *&c.* at the coronation) are ſtill reſerved. Now *petit ſerjeanty* bears a great reſemblance to grand ſerjeanty; for as the one is a perſonal ſervice, ſo the other is a rent or render, both tending to ſome purpoſe relative to the king's per- [82] ſon. Petit ſerjeanty, as defined by Littleton [p], conſiſts in holding lands of the king by the ſervice of rendering to him annually ſome ſmall implement of war, as a bow, a ſword, a lance, an arrow, or the like. This, he ſays [q], is but ſocage in effect; for it is no perſonal ſervice, but a certain rent: and, we may add, it is clearly no predial ſervice, or ſervice of the plough, but in all reſpects *liberum et commune ſocagium*; only being held of the king, it is by way of eminence dignified with the title of *parvum ſervitium regis*, or petit ſerjeanty. And *magna carta* reſpected it in this light, when it enacted [r], that no wardſhip of the lands or body ſhould be claimed by the king in virtue of a tenure by petit ſerjeanty.

TENURE in *burgage* is deſcribed by Glanvil [s], and is expreſsly ſaid by Littleton [t], to be but tenure in ſocage: and it

o Wright. 211.
p § 159.
q § 160.

r *cap.* 27.
s *lib.* 7. *cap.* 3.
t § 162.

is

is where the king or other perſon is lord of an antient borough, in which the tenements are held by a rent certain[u]. It is indeed only a kind of town ſocage; as common ſocage, by which other lands are holden, is uſually of a rural nature. A borough, as we have formerly ſeen, is uſually diſtinguiſhed from other towns by the right of ſending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houſes, or lands which were formerly the ſcite of houſes, in an antient borough, are held of ſome lord in common ſocage, by a certain eſtabliſhed rent. And theſe ſeem to have withſtood the ſhock of the Norman encroachments principally on account of their inſignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would ſcarce have amounted to a knight's fee. Beſides, the owners of them, being chiefly artificers and perſons engaged in trade, could not with any tolerable propriety be put on ſuch a military eſtabliſhment, as the tenure in chivalry was. And here alſo we have again an inſtance,
[83] where a tenure is confeſſedly in ſocage, and yet could not poſſibly ever have been held by plough-ſervice; ſince the tenants muſt have been citizens or burghers, the ſituation frequently a walled town, the tenement a ſingle houſe; ſo that none of the owners was probably maſter of a plough, or was able to uſe one, if he had it. The free ſocage therefore, in which theſe tenements are held, ſeems to be plainly a remnant of Saxon liberty; which may alſo account for the great variety of cuſtoms, affecting many of theſe tenements ſo held in antient burgage: the principal and moſt remarkable of which is that called *Borough Engliſh*, ſo named in contradiſtinction as it were to the Norman cuſtoms, and which is taken notice of by Glanvil[w], and by Littleton[x]; *viz.* that the youngeſt ſon, and not the eldeſt, ſucceeds to the burgage tenement on the death of his father. For which Littleton[y] gives this reaſon; becauſe the younger ſon, by reaſon of his

u Litt. § 162, 163.
w *ubi ſupra.*
x § 165.
y § 211.

tender

tender age, is not ſo capable as the reſt of his brethren to help himſelf. Other authors[z] have indeed given a much ſtranger reaſon for this cuſtom, as if the lord of the fee had antiently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the tenement deſcended not to the eldeſt, but the youngeſt ſon; who was more certainly the offspring of the tenant. But I cannot learn that ever this cuſtom prevailed in England, though it certainly did in Scotland, (under the name of *mercheta* or *marcheta*) till aboliſhed by Malcolm III[a]. And perhaps a more rational account than either may be fetched (though at a ſufficient diſtance) from the practice of the Tartars; among whom, according to father Duhalde, this cuſtom of deſcent to the youngeſt ſon alſo prevails. That nation is compoſed totally of ſhepherds and herdſmen; and the elder ſons, as ſoon as they are capable of leading a paſtoral life, migrate from their father with a certain allotment of cattle; and go to ſeek a new habitation. The youngeſt ſon therefore, who continues lateſt with the father, is naturally the heir of his houſe, the reſt being already provided for. And thus we find that, among many other northern nations, it was the cuſtom for all the ſons but one to migrate from the father, which one be- [84]
came his heir[b]. So that poſſibly this cuſtom, wherever it prevails, may be the remnant of that paſtoral ſtate of our Britiſh and German anceſtors, which Cæſar and Tacitus deſcribe. Other ſpecial cuſtoms there are in different burgage tenures; as that, in ſome, the wife ſhall be endowed of *all* her huſband's tenements[c], and not of the third part only, as at the common law: and that, in others, a man might diſpoſe of his tenements by will[d], which, in general, was not permitted after the conqueſt till the reign of Henry the eighth; though in the Saxon times it was allowable[e]. A pregnant proof that theſe liberties of ſocage tenure were fragments of Saxon liberty.

[z] 3 Mod. Pref.

[a] Seld. tit. of hon. 2. 1. 47. *Reg. Mag. l.* 4. c. 31.

[b] *Pater cunctos filios adultos a ſe pellebat, praeter unum quem haeredem ſui juris relinquebat.* (*Walſingh. Upodigm. Neuſtr. c.* 1.)

[c] Litt. § 166.

[d] § 167.

[e] Wright. 172.

THE nature of the tenure in *gavelkind* affords us a ſtill ſtronger argument. It is univerſally known what ſtruggles the Kentiſh men made to preſerve their antient liberties, and with how much ſucceſs thoſe ſtruggles were attended. And as it is principally here that we meet with the cuſtom of gavelkind, (though it was and is to be found in ſome other parts of the kingdom [f]) we may fairly conclude that this was a part of thoſe liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conqueſt was the general cuſtom of the realm [g]. The diſtinguiſhing properties of this tenure, are various: ſome of the principal are theſe; 1. The tenant is of age ſufficient to aliene his eſtate by feoffment at the age of fifteen [h]. 2. The eſtate does not eſcheat in caſe of an attainder and execution for felony; their maxim being, "the "father to the bough, the ſon to the plough [i]." 3. In moſt places he had a power of deviſing lands by will, before the ſtatute for that purpoſe was made [k]. 4. The lands deſcend, not to the eldeſt, youngeſt, or any one ſon only, but to all the ſons together [l]; which was indeed antiently the moſt
[85] uſual courſe of deſcent all over England [m], though in particular places particular cuſtoms prevailed. Theſe, among other properties, diſtinguiſhed this tenure in a moſt remarkable manner: and yet it is ſaid to be only a ſpecies of a ſocage tenure, modified by the cuſtom of the country; the lands being holden by ſuit of court and fealty, which is a ſervice in it's nature certain [n]. Wherefore, by a charter of king John [o], Hubert archbiſhop of Canterbury was authoriſed to *exchange* the gavelkind tenures holden of the ſee of Canterbury into tenures by knight's-ſervice; and by ſtatute 31 Hen. VIII. c. 3. for diſgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be deſcendible for

[f] Stat. 32 Hen. VIII. c. 29. Kitch. of courts, 200.

[g] *In toto regno, ante ducis adventum, frequens et uſitata fuit: poſtea caeteris adempta, ſed privatis quorundam locorum conſuetudinibus alibi poſtea regerminans: Cantianis ſolum integra et inviolata remanſit.* (*Analect. l.* 2. *c.* 7.)

[h] Lamb. Peramb. 614.

[i] Lamb. 634.

[k] F. N. B. 198. Cro. Car. 561.

[l] Lit. § 210.

[m] Glanvil. *l.* 7. *c.* 3.

[n] Wright. 211.

[o] Spelm. *cod. vet. leg.* 355.

the future *like other lands which were never holden by ſervice of ſocage.* Now the immunities which the tenants in gavelkind enjoyed were ſuch, as we cannot conceive ſhould be conferred upon mere ploughmen and peaſants: from all which I think it ſufficiently clear, that tenures in free ſocage are in general of a nobler original than is aſſigned by Littleton, and after him by the bulk of our common lawyers.

HAVING thus diſtributed and diſtinguiſhed the ſeveral ſpecies of tenure in free ſocage, I proceed next to ſhew that this alſo partakes very ſtrongly of the feodal nature. Which may probably ariſe from it's antient Saxon original; ſince (as was before obſerved [p]) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into ſuch arbitrary conſequences as among the Normans. It ſeems therefore reaſonable to imagine, that ſocage tenure exiſted in much the ſame ſtate before the conqueſt as after; that in Kent it was preſerved with a high hand, as our hiſtories inform us it was; and that the reſt of the ſocage tenures diſperſed through England eſcaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own inſignificancy: ſince I do not apprehend the number of ſocage tenures ſoon after the conqueſt to have been very conſiderable, nor their value by any means large; till by ſucceſſive charters of enfranchiſement granted to the tenants, which are particularly mentioned by Britton [q], their number and [86] value began to ſwell ſo far, as to make a diſtinct, and juſtly envied, part of our Engliſh ſyſtem of tenures.

HOWEVER this may be, the tokens of their feodal original will evidently appear from a ſhort compariſon of the incidents and conſequences of ſocage tenure with thoſe of tenure in chivalry; remarking their agreement or difference as we go along.

1. IN the firſt place, then, both were held of ſuperior lords; one of the king, either immediately, or as lord paramount,

p pag. 48. q c. 66.

and (in the latter caſe) of a ſubject or meſne lord between the king and the tenant.

2. BOTH were ſubject to the feodal return, render, rent, or ſervice of ſome ſort or other, which aroſe from a ſuppoſition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from it's nature uncertain; in ſocage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though perhaps nothing more than bare fealty) and ſo continues to this day.

3. BOTH were, from their conſtitution, univerſally ſubject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant[r]. Which oath of fealty uſually draws after it ſuit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reaſon given by Littleton[s], that if it be neglected, it will by long continuance of time grow out of memory (as doubtleſs it frequently hath done) whether the land be holden of the lord or not; and ſo he may loſe his ſeignory, and the profit which may accrue to him by eſcheats and other contingencies[t].

4. THE tenure in ſocage was ſubject, of common right, to aids for knighting the ſon and marrying the eldeſt daugh-
[87] ter[u]: which were fixed by the ſtatute Weſtm. 1. c. 36. at 20 *s.* for every 20 *l. per annum* ſo held; as in knight-ſervice. Theſe aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all aboliſhed by the ſtatute 12 Car. II.

5. RELIEF is due upon ſocage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5 *l.* or one quarter of the ſuppoſed value of the land; but a ſocage relief is one

r Litt. § 117. 131.

s § 130.

t *Eo maxime praeſtandum eſt, ne dubium reddatur jus domini et vetuſtate temporis obſcuretur.* (*Corvin. jus feod. l.* 2. *t.* 7.)

u Co. Litt. 91.

year's

year's rent or render, payable by the tenant to the lord, be the ſame either great or ſmall[w]: and therefore Bracton[x] will not allow this to be properly a relief, but *quaedam praeſtatio loco relevii in recognitionem domini.* So too the ſtatute 28 Edw. I. c. 1. declares, that a free ſokeman ſhall give *no relief*, but ſhall double his rent after the death of his anceſtor, according to that which he hath uſed to pay his lord, and ſhall not be grieved above meaſure. Reliefs in knight-ſervice were only payable, if the heir at the death of his anceſtor was of full age: but in ſocage they were due even though the heir was under age, becauſe the lord has no wardſhip over him[y]. The ſtatute of Charles II reſerves the reliefs incident to ſocage tenures; and therefore, wherever lands in fee ſimple are holden by a rent, relief is ſtill due of common right upon the death of a tenant[z].

6. PRIMER ſeiſin was incident to the king's ſocage tenants *in capite*, as well as to thoſe by knight-ſervice[a]. But tenancy *in capite* as well as primer ſeiſins are, among the other feodal burthens, entirely aboliſhed by the ſtatute.

7. WARDSHIP is alſo incident to tenure in ſocage; but of a nature very different from that incident to knight-ſervice. For if the inheritance deſcend to an infant under fourteen, the wardſhip of him does not, nor ever did, belong to the lord of the fee; becauſe, in this tenure, no military or other perſonal ſervice being required, there was no occaſion [88] for the lord to take the profits, in order to provide a proper ſubſtitute for his infant tenant: but his neareſt relation (to whom the inheritance cannot deſcend) ſhall be his guardian in ſocage, and have the cuſtody of his land and body till he arrives at the age of fourteen. The guardian muſt be ſuch a one, to whom the inheritance by no poſſibility can deſcend; as was fully explained, together with the reaſons for it, in the former book of theſe commentaries[b]. At fourteen this wardſhip in ſocage ceaſes; and the heir may ouſt the guardian,

w Litt. § 126.
x *l.* 2. *c.* 37. § 8.
y Litt. § 127.
z 3 Lev. 145.
a Co. Litt. 77.
b Vol. I. page 461.

and call him to account for the rents and profits [c]: for at this age the law ſuppoſes him capable of chuſing a guardian for himſelf. It was in this particular, of wardſhip, as alſo in that of marriage, and in the certainty of the render or ſervice, that the ſocage tenures had ſo much the advantage of the military ones. But as the wardſhip ceaſed at fourteen, there was this diſadvantage attending it: that young heirs, being left at ſo tender an age to chuſe their own guardians till twenty-one, might make an improvident choice. Therefore, when almoſt all the lands in the kingdom were turned into ſocage tenures, the ſame ſtatute 12 Car. II. c. 24. enacted, that it ſhould be in the power of any father by will to appoint a guardian, till his child ſhould attain the age of twenty-one (2). And, if no ſuch appointment be made, the court of chancery will frequently interpoſe, and name a guardian, to prevent an infant heir from improvidently expoſing himſelf to ruin.

8. MARRIAGE, or the *valor maritagii*, was not in ſocage tenure any perquiſite or advantage to the guardian, but rather the reverſe. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unleſs he married him to advantage [d]. For, the law, in favour of infants, is always jealous of guardians, and therefore in this caſe it made them account, not only for what they *did*, but alſo for what they *might*, receive on the infant's behalf;
[89] leſt by ſome colluſion the guardian ſhould have received the value, and not brought it to account: but, the ſtatute having deſtroyed all values of marriages, this doctrine of courſe hath ceaſed with them. At fourteen years of age the ward might have diſpoſed of himſelf in marriage, without any conſent of his guardian, till the late act for preventing clandeſtine marriages. Theſe doctrines of wardſhip and marriage in ſocage

[c] Litt. § 123. Co. Litt. 89. [d] Litt. § 123.

(2) See 1 Vol. 462.

tenure

tenure were ſo diametrically oppoſite to thoſe in knight-ſervice, and ſo entirely agree with thoſe parts of king Edward's laws, that were reſtored by Henry the firſt's charter, as might alone convince us that ſocage was of a higher original than the Norman conqueſt.

9. FINES for alienation were, I apprehend, due for lands holden of the king *in capite* by ſocage tenure, as well as in caſe of tenure by knight-ſervice: for the ſtatutes that relate to this point, and ſir Edward Coke's comment on them[e], ſpeak generally of all tenants *in capite*, without making any diſtinction: but now all fines for alienation are demoliſhed by the ſtatute of Charles the ſecond.

10. ESCHEATS are equally incident to tenure in ſocage, as they were to tenure by knight-ſervice; except only in gavelkind lands, which are (as is before mentioned) ſubject to no eſcheats for felony, though they are to eſcheats for want of heirs[f].

THUS much for the two grand ſpecies of tenure, under which almoſt all the free lands of the kingdom were holden till the reſtoration in 1660, when the former was aboliſhed and ſunk into the latter: ſo that lands of both ſorts are now holden by the one univerſal tenure of free and common ſocage.

THE other grand diviſion of tenure, mentioned by Bracton as cited in the preceding chapter, is that of *villenage*, as contradiſtinguiſhed from *liberum tenementum*, or frank tenure. And this (we may remember) he ſubdivides into two claſſes, *pure* and *privileged* villenage: from whence have ariſen two other ſpecies of our modern tenures.

III. FROM the tenure of pure villenage have ſprung our preſent *copyhold* tenures, or tenure by copy of court roll at the will of the lord: in order to obtain a clear idea of which, it will be previouſly neceſſary to take a ſhort view of the original and nature of manors. [90]

[e] 1 Inſt. 43. 2 Inſt. 65, 66, 67. [f] Wright. 210.

MANORS are in ſubſtance as antient as the Saxon conſtitution, though perhaps differing a little, in ſome immaterial circumſtances, from thoſe that exiſt at this day[g]: juſt as we obſerved of feuds, that they were partly known to our anceſtors, even before the Norman conqueſt. A manor, *manerium, a manendo*, becauſe the uſual reſidence of the owner, ſeems to have been a diſtrict of ground, held by lords or great perſonages; who kept in their own hands ſo much land as was neceſſary for the uſe of their families, which were called *terrae dominicales* or *demeſne* lands; being occupied by the lord, or *dominus manerii*, and his ſervants. The other, or *tenemental*, lands they diſtributed among their tenants: which from the different modes of tenure were diſtinguiſhed by two different names. Firſt, *book-land*, or charter-land, which was held by deed under certain rents and free-ſervices, and in effect differed nothing from free ſocage lands[h]: and from hence have ariſen moſt of the freehold tenants who hold of particular manors, and owe ſuit and ſervice to the ſame. The other ſpecies was called *folk-land*, which was held by no aſſurance in writing, but diſtributed among the common folk or people at the pleaſure of the lord, and reſumed at his diſcretion; being indeed land held in villenage, which we ſhall preſently deſcribe more at large. The reſidue of the manor being uncultivated, was termed the lord's waſte, and ſerved for public roads, and for common of paſture to the lord and his tenants. Manors were formerly called baronies, as they ſtill are lordſhips: and each lord or baron was empowered to hold a domeſtic court, called the court-baron, for redreſſing miſdemeſnors and nuſances within the manor, and for ſettling diſputes of property among the tenants. This court is an inſeparable ingredient of every manor; and if the number
[91] of ſuitors ſhould ſo fail as not to leave ſufficient to make a jury or homage, that is, two tenants at the leaſt, the manor itſelf is loſt.

IN the early times of our legal conſtitution, the king's greater barons, who had a large extent of territory held un-

g Co. Cop. § 2. & 10.

h Co. Cop. § 3.

der the crown, granted out frequently ſmaller manors to inferior perſons to be holden of themſelves; which do therefore now continue to be held under a ſuperior lord, who is called in ſuch caſes the lord paramount over all theſe manors: and his ſeignory is frequently termed an honour, not a manor, eſpecially if it hath belonged to an antient feodal baron, or hath been at any time in the hands of the crown. In imitation whereof, theſe inferior lords began to carve out and grant to others ſtill more minute eſtates, to be held as of themſelves, and were ſo proceeding downwards *in infinitum*; till the ſuperior lords obſerved, that by this method of ſubinfeudation they loſt all their feodal profits of wardſhips, marriages, and eſcheats, which fell into the hands of theſe meſne or middle lords, who were the immediate ſuperiors of the *terre-tenant*, or him who occupied the land: and alſo that the meſne lords themſelves were ſo impoveriſhed thereby, that they were diſabled from performing their ſervices to their own ſuperiors. This occaſioned, firſt, that proviſion in the thirty-ſecond chapter of *magna carta*, 9 Hen. III. (which is not to be found in the firſt charter granted by that prince, nor in the great charter of king John [i]) that no man ſhould either give or ſell his land, without reſerving ſufficient to anſwer the demand of his lord; and, afterwards the ſtatute of Weſtm. 3. or *quia emptores*, 18 Edw. I. c. 1. which directs, that, upon all ſales or feoffments of land, the feoffee ſhall hold the ſame, not of his immediate feoffor, but of the chief lord of the fee, of whom ſuch feoffor himſelf held it. But theſe proviſions, not extending to the king's own tenants *in capite*, the like law concerning them is declared by the ſtatutes of *prerogativa regis*, 17 Edw. II. c. 6. and of 34 Edw. III. c. 15. by which laſt all ſubinfeudations, previous to the reign of king Edward I, were confirmed: but all ſubſequent to that period [92]
were left open to the king's prerogative. And from hence it is clear, that all manors exiſting at this day, muſt have exiſted as early as king Edward the firſt: for it is eſſential to a manor, that there be tenants who hold of the lord; and, by the operation of theſe ſtatutes, no tenant *in capite* ſince the

[i] See the Oxford editions of the charters.

accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself.

Now with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feodal, Norman, or Saxon; but mixed and compounded of them all[k]: and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in it's composition. Under the Saxon government there were, as sir William Temple speaks[l], a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they, who were strangers to any other than a feodal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition[m]. This they called villenage, and the tenants villeins, either from the word *vilis*, or else, as sir Edward Coke tells us[n], *a villa*; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

[93] THESE villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferrable by deed from one owner to another[o]. They could not leave their

k Wright. 215.
l Introd. Hist. Engl 59.
m Wright. 217.
n 1 Inst. 116.
o Litt. § 181.

lord

lord without his permiſſion; but if they ran away, or were purloined from him, might be claimed and recovered by action, like beaſts or other chattels. They held indeed ſmall portions of land by way of ſuſtaining themſelves and families; but it was at the mere will of the lord, who might diſpoſſeſs them whenever he pleaſed; and it was upon villein ſervices, that is, to carry out dung, to hedge and ditch the lord's demeſnes, and any other the meaneſt offices[p]: and their ſervices were not only baſe, but uncertain both as to their time and quantity[q]. A villein, in ſhort, was in much the ſame ſtate with us, as lord Moleſworth[r] deſcribes to be that of the boors in Denmark, and which Stiernhook[s] attributes alſo to the *traals* or ſlaves in Sweden; which confirms the probability of their being in ſome degree monuments of the Daniſh tyranny. A villein could acquire no property either in lands or goods: but, if he purchaſed either, the lord might enter upon them, ouſt the villein, and ſeiſe them to his own uſe, unleſs he contrived to diſpoſe of them again before the lord had ſeiſed them; for the lord had then loſt his opportunity[t].

IN many places alſo a fine was payable to the lord, if the villein preſumed to marry his daughter to any one without leave from the lord[u]: and, by the common law, the lord might alſo bring an action againſt the huſband for damages in thus purloining his property[w]. For the children of vil-

p *Ibid.* § 172.

q *Ille qui tenet in villenagio faciet quicquid ei praeceptum fuerit, nec ſcire debet ſero quid facere debet in craſtino, et ſemper tenebitur ad incerta.* (Bracton. *l.* 4. *tr.* 1. c. 28.) (3)

r c. 8.

s *de jure Sueonum, l.* 2. *c.* 4.

t Litt. § 177.

u Co. Litt. 140.

w Litt. § 202.

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(3) This is an eloquent deſcription of ſlavery. Villeins were not protected by *magna charta*; *nullus liber homo capiatur vel impriſonetur*, &c. was cautiouſly expreſſed to exclude the poor villein; for as lord Coke tells us, the lord may beat his villein, and if it be without cauſe, he cannot have any remedy. What a degraded condition for a being endued with reaſon!

leins

leins were alſo in the ſame ſtate of bondage with their parents; whence they were called in Latin, *nativi*, which gave
[94] riſe to the female appellation of a villein, who was called a *neiſe*[x]. In caſe of a marriage between a freeman and a neiſe, or a villein and a freewoman, the iſſue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus ſequitur ventrem*. But no baſtard could be born a villein, becauſe by another maxim of our law he is *nullius filius*; and as he can *gain* nothing by inheritance, it were hard that he ſhould *loſe* his natural freedom by it[y]. The law however protected the perſons of villeins, as the king's ſubjects, againſt atrocious injuries of the lord: for he might not kill, or maim his villein[z]; though he might beat him with impunity, ſince the villein had no action or remedy at law againſt his lord, but in caſe of the murder of his anceſtor, or the maim of his own perſon. Neiſes indeed had alſo an appeal of rape, in caſe the lord violated them by force[a].

VILLEINS might be enfranchiſed by manumiſſion, which is either expreſs or implied: expreſs; as where a man granted to the villein a deed of manumiſſion[b]: implied; as where a man bound himſelf in a bond to his villein for a ſum of money, granted him an annuity by deed, or gave him an eſtate in fee, for life or years[c]; for this was dealing with his villein on the footing of a freeman, it was in ſome of the inſtances giving him an action againſt his lord, and in others veſting in him an ownerſhip entirely inconſiſtent with his former ſtate of bondage. So alſo if the lord brought an action againſt his villein, this enfranchiſed him[d]; for, as the lord might have a ſhort remedy againſt his villein, by ſeiſing his goods, (which was more than equivalent to any damages he could recover) the law, which is always ready to catch at any thing in favour of liberty, preſumed that

x Litt. § 187.
y *Ibid.* § 187, 188.
z *Ibid.* § 189. 194.
a *Ibid.* § 190.
b *Ibid.* § 204.
c § 204, 5, 6.
d § 208.

by

by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law. [95]

VILLEINS, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the good-nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands, in spight of any determination of the lord's will. For, though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to shew for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court roll*, and their tenure itself a *copyhold*[e].

THUS copyhold tenures, as sir Edward Coke observes[f], although very meanly descended, yet come of an ancient house; for, from what has been premised, it appears, that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which

e F. N. B. 12.

f Cop. § 32.

before

before were held abſolutely at the lord's will (4). Which affords a very ſubſtantial reaſon for the great variety of cuſtoms that prevail in different manors, with regard both to the deſcent of the eſtates, and the privileges belonging to the tenants. And theſe encroachments grew to be ſo univerſal, that when tenure in villenage was virtually aboliſhed, (though copyholds were reſerved) by the ſtatute of Charles II, there was hardly a pure villein left in the nation. For ſir Thomas Smith [g] teſtifies, that in all his time (and he was ſecretary to Edward VI) he never knew any villein in groſs throughout the realm; and the few villeins regardant that were then remaining were ſuch only as had belonged to biſhops, monaſteries, or other eccleſiaſtical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks, and friars, "had in their confeſſions, and ſpecially in their extreme and "deadly ſickneſs, convinced the laity how dangerous a "practice it was, for one chriſtian man to hold another in "bondage: ſo that temporal men by little and little, by "reaſon of that terror in their conſciences, were glad to "manumit all their villeins. But the ſaid holy fathers,

[g] Commonwealth. b. 3. c. 10.

(4) Lord Loughborough is inclined to queſtion this origin of copyholds. "I cannot help doubting (obſerves that learned lord) "whether this deduction is not founded in miſtake. The circum-"ſtance which firſt led me to entertain the doubt is, that in thoſe "parts of Germany from whence the Saxons migrated into Eng-"land, there *exiſts, at this day*, a ſpecies of tenure exactly the ſame "with our copyhold eſtates; and there exiſts likewiſe, *at this day*, "a complete ſtate of *villenage*; ſo that both ſtand together, and "are not one tenure growing out of another, and by degrees aſ-"ſuming its place, &c. &c. What I have ſtated, I found in a "very accurate treatiſe of German law by Selchow, one of the pro-"feſſors of the univerſity of Gottingen, entitled, *Elementa Juris "privati Germanici*. This ſeems ſufficient to negative the idea, that "copyholders ſprang out of villeins. In England, villenage has "ceaſed, and copyholds remain; but here, as in other countries, "they both prevailed at the ſame time." *Doug.* 698.

"with the abbots and priors, did not in like fort by theirs; "for they alfo had a fcruple in confcience to impoverifh and "defpoil the church fo much, as to manumit fuch as were "bond to their churches, or to the manors which the church "had gotten; and fo kept their villeins ftill (5)." By thefe feveral means the generality of villeins in the kingdom have long ago fprouted up into copyholders: their perfons being enfranchifed by manumiffion or long acquiefcence; but their eftates, in ftrictnefs, remaining fubject to the fame fervile conditions and forfeitures as before; though, in general, the villein fervices are ufually commuted for a fmall pecuniary quit-rent [h].

As a farther confequence of what has been premifed, we may collect thefe two main principles, which are held [i] to be the fupporters of the copyhold tenure, and without which it cannot exift; 1. That the lands be parcel of, and fituate within that manor, under which it is held. 2. That they have been demifed, or demifeable, by copy of court roll immemorially. For immemorial cuftom is the life of all tenures by copy; fo that no new copyhold can, ftrictly fpeaking, be granted at this day. [97]

In fome manors, where the cuftom hath been to permit the heir to fucceed the anceftor in his tenure, the eftates are ftiled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only; for the cuftom of the manor has in both

h In fome manors the copyholders were bound to perform the moft fervile offices, as to hedge and ditch the lord's grounds, to lop his trees, and reap his corn, and the like; the lord ufually finding them meat and drink, and fometimes (as is ftill the ufe in the highlands of Scotland) a minftrel or piper for their diverfion. (*Rot. Maner. de Edgware Com. Midd.*) As in the kingdom of Whidah, on the flave coaft of Africa, the people are bound to cut and carry in the king's corn from off his demefne lands, and are attended by mufic during all the time of their labour. (Mod. Un. Hift. xvi. 429.)

i Co. Litt 58.

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(5) The laft claim of villenage, which we find recorded in our courts, was in the 15th of Ja. I. *Nov*, 27. 11 *Harg. St. Tr.* 342.

cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

THE fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services, (as well in rents as otherwise) reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But, besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter[k], are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seised them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Ward-
[98] ship, in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian; who usually assigns some relation of the infant tenant to act in his stead: and he, like guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seisins, due on the death of each tenant, others are mere fines for alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom: but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reasonable* in their extent; otherwise they might amount to a disherison of the estate. No fine therefore is allowed to be taken upon descents and alienations, (unless in particular circumstances) of more than two years improved value of

[k] See ch. 28.

the

the eſtate[k] (6). From this inſtance we may judge of the favourable diſpoſition that the law of England (which is a law of liberty) hath always ſhewn to this ſpecies of tenants; by removing, as far as poſſible, every real badge of ſlavery from them, however ſome nominal ones may continue. It ſuffered cuſtom very early to get the better of the expreſs terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the cuſtom of the manor: and, where no cuſtom has been ſuffered to grow up to the prejudice of the lord, as in this caſe of arbitrary fines, the law itſelf interpoſes with an equitable moderation, and will not ſuffer the lord to extend his power ſo far, as to diſinherit the tenant.

THUS much for the antient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord*, which is lineally deſcended from it.

IV. THERE is yet a fourth ſpecies of tenure, deſcribed by Bracton under the name ſometimes of *privileged* villenage, and ſometimes of *villein-ſocage*. This, he tells us[l], is ſuch as has been held of the kings of England from the conqueſt downwards; that the tenants herein, "*villana faciunt ſervitia,* [99]
"*ſed certa et determinata;*" that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can: but muſt ſurrender them to the lord or his ſteward, to be again granted out and held in villenage. And from theſe circumſtances we may collect, that what he here

k 2 Ch. Rep. 134.

l *l.* 4. *tr.* 1. *c.* 28.

(6) It is now eſtabliſhed as an univerſal rule, that, where the fine upon the deſcent or alienation of a copyhold is arbitrary, it cannot be more than two years improved value. In aſcertaining the yearly value, the quit-rents muſt be deducted, but not the land-tax. *Doug.* 697.

The fine may be recovered by the lord in an action of aſſumpſit. *Ib.* But he has no right to it till the admittance of the tenant. 2 *T. R.* 484.

deſcribes

describes is no other than an exalted species of copyhold, subsisting at this day, *viz.* the tenure in *antient demesne;* to which, as partaking of the baseness of villenage in the nature of it's services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium.*

ANTIENT demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the confessor, or William the conqueror; and so appear to have been by the great survey in the exchequer called domesday-book [m]. The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies [n], continued for a long time pure and absolute villeins, dependent on the will of the lord: and those who have succeeded them in their tenures now differ from common copyholders in only a few points [o]. Others were in great measure enfranchised by the royal favour: being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain; as, to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them [p]; as, to try the right of their property in a peculiar court of their own, called a court of antient demesne, by a peculiar process denominated a writ of *right close* [q] (7); not to pay toll or taxes; not to contribute to the expences of knights of the shire; not to be put on juries; and the like [r].

m F. N. B. 14. 16.
n c. 66.
o F. N. B. 228.
p 4 Inst. 269.
q F. N. B. 11.
r *Ibid.* 14.

(7) In an action of ejectment, it may be pleaded in abatement, that the lands are part of a manor which is held in antient demesne; but such a plea must be sworn to, and is not favoured. 2 *Burr.* 1046.

THESE

THESE tenants therefore, though their *tenure* be abſolutely copyhold, yet have an *intereſt* equivalent to a freehold: for, notwithſtanding their ſervices were of a baſe and villenous original[s], yet the tenants were eſteemed in all other reſpects to be highly privileged villeins; and eſpecially for that their ſervices were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquiſh theſe tenements at the lord's will, or to hold them againſt their own: "*et ideo*, ſays Bracton, *dicuntur liberi*." Britton alſo, from ſuch their freedom, calls them abſolutely *ſokemans*, and their tenure *ſokemanries*; which he deſcribes[t] to be "lands and tenements, "which are not held by knight-ſervice, nor by grand ſerjean-"ty, nor by petit, but by ſimple ſervices, being, as it were, "lands enfranchiſed by the king or his predeceſſors from "their antient demeſne." And the ſame name is alſo given them in Fleta[u]. Hence Fitzherbert obſerves[w], that no lands are antient demeſne, but lands holden in ſocage; that is, not in free and common ſocage, but in this amphibious ſubordinate claſs of villein-ſocage. And it is poſſible, that as this ſpecies of ſocage tenure is plainly founded upon predial ſervices, or ſervices of the plough, it may have given cauſe to imagine that all ſocage tenures aroſe from the ſame original; for want of diſtinguiſhing, with Bracton, between free-ſocage or ſocage of frank-tenure, and villein-ſocage or ſocage of antient demeſne.

LANDS holden by this tenure are therefore a ſpecies of copyhold, and as ſuch preſerved and exempted from the operation of the ſtatute of Charles II. Yet they differ from common copyholds, principally in the privileges beforementioned: as alſo they differ from freeholders by one eſpecial mark and tincture of villenage, noted by Bracton and remaining to this day; *viz.* that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the reſt; but muſt paſs by ſurrender to the lord or his ſteward, in the manner of common copyholds:

[s] Gilb. hiſt. of exch. 16. & 30.
[t] c. 66.
[u] *l.* 1. *c.* 8.
[w] N. B. 13.

yet with this diſtinction[x], that, in the ſurrender of theſe lands in antient demeſne, it is not uſed to ſay "*to hold at the will of the lord*" in their copies, but only, "*to hold according to the cuſtom of the manor.*"

THUS have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both antient and modern, in which we cannot but remark the mutual connexion and dependence that all of them have upon each other. And upon the whole it appears, that, whatever changes and alterations theſe tenures have in proceſs of time undergone, from the Saxon æra to the 12 Car. II. all lay tenures are now in effect reduced to two ſpecies; *free* tenure in common ſocage, and *baſe* tenure by copy of court roll.

I MENTIONED *lay* tenures only; becauſe there is ſtill behind one other ſpecies of tenure, reſerved by the ſtatute of Charles II, which is of a *ſpiritual* nature, and called the tenure in frank-almoign.

V. TENURE in *frankalmoign, in libera eleemoſyna*, or free alms, is that, whereby a religious corporation, aggregate or ſole, holdeth lands of the donor to them and their ſucceſſors for ever[y]. The ſervice which they were bound to render for theſe lands was not certainly defined: but only in general to pray for the ſouls of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other ſervices but this[z]) becauſe this divine ſervice was of a higher and more exalted nature[a]. This is the tenure, by which almoſt all the antient monaſteries and religious houſes held their lands; and by which the parochial clergy, and very many eccleſiaſtical and eleemoſynary foundations, hold them at this day[b]; the nature of the ſervice being upon the reformation altered, and made conformable to the purer doctrines

x Kitchen on courts. 194.

y Litt. § 133.

z *Ibid.* 131.

a *Ibid.* 135.

b Bracton. *l.* 4. *tr.* 1. *c.* 28. § 1.

of

of the church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shewn to religion and religious men in [102] antient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions [c]: just as the Druids, among the antient Britons, had *omnium rerum immunitatem* [d]. And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feodal but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor to correct it [e]. Wherein it materially differs from what was called *tenure by divine service:* in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrein, without any complaint to the visitor [f]. All such donations are indeed now out of use: for, since the statute of *quia emptores*, 18 Edw. I. none but the king can give lands to be holden by this tenure [g]. So that I only mention them, because *frankalmoign* is excepted by name in the statute of Charles II, and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

c Seld. *Jan.* 1. 42.
d Cæsar *de bell. Gal.* *l.* 6. *c.* 13.
e Litt. § 136.
f *Ibid.* 137.
g *Ibid.* 140.

CHAPTER THE SEVENTH.

OF FREEHOLD ESTATES, OF INHERITANCE.

THE next objects of our disquisitions are the nature and properties of *estates*. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant hath therein: so that if a man grants all *his estate* in Dale to A and his heirs, every thing that he can possibly grant shall pass thereby [a]. It is called in Latin *status*; it signifying the condition, or circumstance, in which the owner stands, with regard to his property. And, to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the *quantity of interest* which the tenant has in the tenement: secondly, with regard to the *time* at which that quantity of interest is to be enjoyed: and, thirdly, with regard to the *number* and *connections* of the tenants.

FIRST, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by it's duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man: to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, months, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of

a Co. Litt. 345.

estates,

estates, into such as are *freehold*, and such as are *less than freehold*.

AN estate of freehold, *liberum tenementum*, or franktenement, is defined by Britton [b] to be "the *possession* of the soil "by a freeman." And St. Germyn [c] tells us, that "the "possession of the land is called in the law of England the "franktenement or freehold." Such estate therefore, and no other, as requires actual possession of the land, is legally speaking *freehold*: which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin, or in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton [d], that where a freehold shall pass, it behoveth to have livery of seisin. As therefore estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates (1).

b c. 32. c Dr. & Stud, b. 2. d. 22. d § 59.

(1) A freehold estate seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in, or arising from, real property of free tenure; that is, now, of all which is not copyhold. And the learned Judge has elsewhere informed us, that "tithes and spi- "ritual dues are freehold estates, whether the land out of which "they issue are bond or free, being a separate and distinct inherit- "ance from the lands themselves. And in this view they must be "distinguished and excepted from other incorporeal hereditaments "issuing out of land, as rents, &c. which, in general, will fol- "low the nature of their principal, and cannot be freehold, unless "the stock, from which they spring, be freehold also." 1 *Bl. Tracts*, 116.

ESTATES of freehold (thus underſtood) are either eſtates *of inheritance*, or eſtates *not of inheritance*. The former are again divided into inheritances *abſolute* or fee-ſimple; and inheritances *limited*, one ſpecies of which we uſually call fee-tail.

I. TENANT in fee-ſimple (or, as he is frequently ſtiled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever[e]; generally, abſolutely, and ſimply; without mentioning *what* heirs, but referring that to his own pleaſure, or to the diſpoſition of the law. The true meaning of the word fee *(feodum)* is the ſame with that of feud or fief, and in it's original ſenſe it is
[105] taken in contradiſtinction to *allodium*[f]; which latter the writers on this ſubject define to be every man's own land, which he poſſeſſeth merely in his own right, without owing any rent or ſervice to any ſuperior. This is property in it's higheſt degree; and the owner thereof hath *abſolutum et directum dominium*, and therefore is ſaid to be ſeiſed thereof abſolutely *in dominico ſuo*, in his own demeſne. But *feodum*, or fee, is that which is held of ſome ſuperior, on condition of rendering him ſervice; in which ſuperior the ultimate property of the land reſides. And therefore ſir Henry Spelman[g] defines a feud or fee to be the right which the vaſal or tenant hath in lands, to *uſe* the ſame, and take the profits thereof to him and his heirs, rendering to the lord his due ſervices; the mere allodial *propriety* of the ſoil always remaining in the lord. This allodial property no ſubject in England has[h]; it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *abſolutum et directum dominium*[i]: but all ſubjects' lands are in the nature of *feodum* or fee; whether derived to them by deſcent from their anceſtors, or purchaſed for a valuable conſideration: for they cannot come to any man by either of thoſe ways, unleſs accompanied with thoſe feodal clogs, which

e Litt. § 1.
f See pag. 45. 47.
g of feuds, c. 1.
h Co. Litt. 1.

i *Praedium domini regis eſt directum dominium, cujus nullus eſt author niſi Deus. Ibid.*

were

were laid upon the firſt feudatory when it was originally granted. A ſubject therefore hath only the uſufruct, and not the abſolute property of the ſoil; or, as ſir Edward Coke expreſſes it[k], he hath *dominium utile*, but not *dominium directum*. And hence it is that, in the moſt ſolemn acts of law, we expreſs the ſtrongeſt and higheſt eſtate that any ſubject can have, by theſe words; "he is ſeiſed thereof *in his demeſne*, "*as of fee*." It is a man's demeſne, *dominicum*, or property, ſince it belongs to him and his heirs for ever: yet this *dominicum*, property, or demeſne, is ſtrictly not abſolute or allodial, but qualified or feodal: it is his demeſne, *as of fee*; that is, it is not purely and ſimply his own, ſince it is held of a ſuperior lord, in whom the ultimate property reſides.

THIS is the primary ſenſe and acceptation of the word *fee*. [106] But (as ſir Martin Wright very juſtly obſerves[l]) the doctrine, "that all lands are holden," having been for ſo many ages a fixed and undeniable axiom, our Engliſh lawyers do very rarely (of late years eſpecially) uſe the word *fee* in this it's primary original ſenſe, in contradiſtinction to *allodium* or abſolute property, with which they have no concern; but generally uſe it to expreſs the continuance or quantity of eſtate. A *fee* therefore, in general, ſignifies an eſtate of inheritance; being the higheſt and moſt extenſive intereſt that a man can have in a feud: and, when the term is uſed ſimply, without any other adjunct, or has the adjunct of *ſimple* annexed to it, (as a fee, or a fee-ſimple) it is uſed in contradiſtinction to a fee conditional at the common law, or a fee-tail by the ſtatute; importing an abſolute inheritance, clear of any condition, limitation, or reſtrictions to particular heirs, but deſcendible to the heirs general, whether male or female, lineal or collateral. And in no other ſenſe than this is the king ſaid to be ſeiſed in fee, he being the feudatory of no man[m].

TAKING therefore *fee* for the future, unleſs where otherwiſe explained, in this it's ſecondary ſenſe, as a ſtate of inheritance, it is applicable to, and may be had in, any kind of heredita-

[k] Co. Litt. 1.

[l] of ten. 148.

[m] Co. Litt. 1.

ments either corporeal or incorporeal [n]. But there is this diſtinction between the two ſpecies of hereditaments; that, of a corporeal inheritance a man ſhall be ſaid to be ſeiſed *in his demeſne, as of fee*; of an incorporeal one, he ſhall only be ſaid to be ſeiſed *as of fee*, and not in his demeſne [o]. For, as incorporeal hereditaments are in their nature collateral to, and iſſue out of, lands and houſes [p], their owner hath no property, *dominicum*, or demeſne, in the *thing* itſelf, but hath only ſomething derived out of it; reſembling the *ſervitutes*, or ſervices, of the civil law [q]. The *dominicum* or property is frequently
[107] in one man, while the appendage or ſervice is in another. Thus Gaius may be ſeiſed *as of fee* of a way leading over the land, of which Titius is ſeiſed *in his demeſne as of fee*.

THE fee-ſimple or inheritance of lands and tenements is generally veſted and reſides in ſome perſon or other; though divers inferior eſtates may be carved out of it. As if one grants a leaſe for twenty-one years, or for one or two lives, the fee-ſimple remains veſted in him and his heirs; and after the determination of thoſe years or lives, the land reverts to the grantor or his heirs, who ſhall hold it again in fee-ſimple. Yet ſometimes the fee may be in *abeyance*, that is (as the word ſignifies) in expectation, remembrance, and contemplation in law; there being no perſon in *eſſe*, in whom it can veſt and abide: though the law conſiders it as always potentially exiſting, and ready to veſt whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it veſt in the heirs of Richard till his death, *nam nemo eſt haeres viventis*: it remains therefore in waiting or abeyance, during the life of Richard [r] (2). This is likewiſe always the caſe of a parſon of

n *Feodum eſt quod quis tenet ſibi et haeredibus ſuis, ſive ſit tenementum, ſive reditus, &c.* Flet. *l.* 5. *c.* 5. § 7.

o Litt. § 10.

p See page 20.

q *Servitus eſt jus, quo res mea alterius rei vel perſonae ſervit.* *Ff.* 8. 1. 1.

r Co. Litt. 342.

(2) The inheritance or remainder in ſuch a caſe has been ſaid to be in abeyance, or *in nubibus*, or *in gremio legis*; but Mr. Fearne, with great ability and learning, has expoſed the futility of theſe

 expreſſions,

a church, who hath only an eſtate therein for the term of his life; and the inheritance remains in abeyance[s]. And not only the fee, but the freehold alſo, may be in abeyance; as, when a parſon dies, the freehold of his glebe is in abeyance, until a ſucceſſor be named, and then it veſts in the ſucceſſor[t] (3).

THE word, heirs, is neceſſary in the grant or donation, in order to make a fee, or inheritance. For if land be given

[s] Litt. § 646. [t] *Ibid.* § 647.

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expreſſions, and the erroneous ideas which have been conveyed by them. Mr. Fearne produces authorities, which prove beyond controverſy, "that where a remainder of inheritance is limited in "*contingency* by way of uſe, or by deviſe, the inheritance in the "mean time, if not otherwiſe diſpoſed of, remains in the grantor "and his heirs, or in the heirs of the teſtator, until the contin-"gency happens to take it out of them." *Fearne, Cont. Rem.* 513. 4th edition.

But although, as Mr. Fearne obſerves, "different opinions have "prevailed in reſpect to the admiſſion of this doctrine in convey-"ances at common law," (*ib.* 526.) yet he adduces arguments and authorities, which render the doctrine as unqueſtionable in this caſe as in the two former of *uſes* and *deviſes*. If therefore in the inſtance put by the learned Judge, John ſhould determine his eſtate, either by his death, or by a feoffment in fee, which amounts to a forfeiture, in the life-time of Richard, under which circumſtances the remainder never could veſt in the heirs of Richard; in that caſe, the grantor or his heir may enter and reſume the eſtate.

(3) Mr. Fearne having attacked with ſo much ſucceſs the doctrine of abeyance, the Editor may venture to obſerve, with reſpect to the two laſt inſtances, though they are collected from the text of Littleton, that there hardly ſeems any neceſſity to reſort to abeyance, or *to the clouds*, to explain the reſidence of the inheritance, or of the freehold. In the firſt caſe, the whole fee-ſimple is conveyed to a ſole corporation, the parſon and his ſucceſſors; but if any intereſt is not conveyed, it ſtill remains, as in the former note, in the grantor and his heirs, to whom, upon the diſſolution of the corporation, the eſtate will revert. See 1 vol. 484. And in the ſecond caſe, the freehold ſeems, in fact, from the moment of the death of the parſon, to reſt and abide in the ſucceſſor, who is brought into view and notice by the inſtitution and induction; for after induction he can recover all the rights of the church, which accrued from the death of the predeceſſor.

to a man for ever, or to him and his aſſigns for ever, this veſts in him but an eſtate for life [u]. This very great nicety about the inſertion of the word "heirs" in all feoffments and grants, in order to veſt a fee, is plainly a relic of the feodal [108] ſtrictneſs: by which we may remember [w] it was required that the form of the donation ſhould be punctually purſued; or that, as Crag [x] expreſſes it in the words of Baldus, "*do-* "*nationes ſint ſtricti juris, ne quis plus donaſſe praeſumatur quam* "*in donatione expreſſerit.*" And therefore, as the perſonal abilities of the donee were originally ſuppoſed to be the only inducements to the gift, the donee's eſtate in the land extended only to his own perſon, and ſubſiſted no longer than his life; unleſs the donor, by an expreſs proviſion in the grant, gave it a longer continuance, and extended it alſo to his heirs, But this rule is now ſoftened by many exceptions [y].

FOR, 1. It does not extend to deviſes by will; in which, as they were introduced at the time when the feodal rigour was apace wearing out, a more liberal conſtruction is allowed; and therefore by a deviſe to a man for ever, or to one and his aſſigns for ever, or to one in fee-ſimple, the deviſee hath an eſtate of inheritance; for the intention of the deviſor is ſufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the deviſe be to a man and his aſſigns, without annexing words of perpetuity, there the deviſee ſhall take only an eſtate for life; for it does not appear that the deviſor intended any more(4). 2. Neither does this rule extend to fines or recove-

[u] *Ibid.* § 1.
[w] See pag. 56.
[x] *l.* 1. *t.* 9. § 17.
[y] Co. Litt. 9, 10.

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(4) But it is not neceſſary to uſe any words of perpetuity in a deviſe, in order to give a fee-ſimple, where it appears to be the intention of the teſtator to diſpoſe of all his intereſt in an eſtate, and that is implied from the word eſtate alone; as if a teſtator gives to Richard his eſtate or *eſtates in* or *at* Dale, though neither heirs, aſſigns, or any other word is annexed to Richard's name, yet he takes an eſtate in fee-ſimple. 1 *T. R.* 411. 2 *T. R.* 656. So alſo

ries considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs:" as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed [z]. 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided: but in creations by patent, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the an- [109] cestor, so doth the successor from the predecessor. Nay, in a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*; the word "*frankalmoign*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini*; and in all these cases a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one [a]. 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies [b]. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

[z] Co. Litt. 9. [a] See Vol. I. p. 484. [b] *Ibid.* 249.

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also where lands are given to Richard charged with the payment of a specific sum, and which is not to be raised out of the rents and profits, such a devise without words of perpetuity will carry a fee-simple; for otherwise the devisee might be a loser by dying before he was repaid the sum charged upon the estate. *Hargr. Co. Litt.* 9. *b*.

II. WE

II. WE are next to conſider limited fees, or ſuch eſtates of inheritance as are clogged and confined with conditions, or qualifications, of any ſort. And theſe we may divide into two ſorts; 1. *Qualified*, or *baſe* fees: and 2. Fees *conditional*, ſo called at the common law; and afterwards fees-*tail*, in conſequence of the ſtatute *de donis*.

1. A BASE, or qualified fee, is ſuch a one as has a qualification ſubjoined thereto, and which muſt be determined whenever the qualification annexed to it is at an end. As, in the caſe of a grant to A and his heirs, *tenants of the manor of Dale;* in this inſtance, whenever the heirs of A ceaſe to be tenants of that manor, the grant is entirely defeated. So, when Henry VI granted to John Talbot, lord of the manor of Kingſton-Liſle in Berks, that he and his heirs, lords of the ſaid manor, ſhould be peers of the realm, by the title of barons of Liſle; here John Talbot had a baſe or qualified fee in that dignity[c], and, the inſtant he or his heirs quitted
[110] the ſeignory of this manor, the dignity was at an end. This eſtate is a fee, becauſe by poſſibility it may endure for ever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumſtances, which qualify and debaſe the purity of the donation, it is therefore a qualified or baſe fee.

2. A CONDITIONAL fee, at the common law, was a fee reſtrained to ſome particular heirs, excluſive of others: "*donatio ſtricta et coarctata*[d]; *ſicut certis haeredibus, quibuſdam* "*a ſucceſſione excluſis*:" as to the heirs *of a man's body*, by which only his lineal deſcendants were admitted, in excluſion of collateral heirs; or, to the heirs *male of his body*, in excluſion both of collaterals, and lineal females alſo. It was called a conditional fee, by reaſon of the condition expreſſed or implied in the donation of it, that if the donee died without ſuch particular heirs, the land ſhould revert to the donor. For this was a condition annexed by law to all grants whatſoever; that, on failure of the heirs ſpecified in the grant, the

[c] Co. Litt. 27.

[d] Flet. *l.* 3. *c.* 3. § 5.

grant

grant ſhould be at an end, and the land return to it's antient proprietor[e]. Such conditional fees were ſtrictly agreeable to the nature of feuds, when they firſt ceaſed to be mere eſtates for life, and were not yet arrived to be abſolute eſtates in fee-ſimple. And we find ſtrong traces of theſe limited, conditional fees, which could not be alienated from the lineage of the firſt purchaſer, in our earlieſt Saxon laws[f].

Now, with regard to the condition annexed to theſe fees by the common law, our anceſtors held, that ſuch a gift (to a man and the heirs of his body) was a gift upon condition, that it ſhould revert to the donor, if the donee had no heirs of his body; but, if he had, it ſhould then remain to the donee. They therefore called it a fee-ſimple, on condition that he had iſſue. Now we muſt obſerve, that, when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes abſolute, and wholly unconditional. So that, as ſoon as the grantee [111] had any iſſue born, his eſtate was ſuppoſed to become abſolute, by the performance of the condition; at leaſt, for theſe three purpoſes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own iſſue, but alſo the donor of his intereſt in the reverſion[g]. 2. To ſubject him to forfeit it for treaſon: which he could not do, till iſſue born, longer than for his own life; leſt thereby the inheritance of the iſſue, and reverſion of the donor, might have been defeated[h]. 3. To empower him to charge the land with rents, commons, and certain other incumbrances, ſo as to bind his iſſue[i]. And this was thought the more reaſonable, becauſe, by the birth of iſſue, the poſſibility of the donor's reverſion was rendered more diſtant and precarious: and *his* intereſt ſeems to have been the only one which the law, as it then ſtood, was ſolicitous to protect; without much regard to the right of ſucceſſion intended to be veſted in the iſſue.

e Plowd. 241.

f *Si quis terram haereditariam habeat, eam non vendat a cognatis haeredibus ſuis, ſi illi viro prohibitum ſit, qui eam ab initio acquiſivit, ut ita facere nequeat.* LL. *Aelfred*, c. 37.

g Co. Litt. 19. 2 Inſt. 233.

h Co. Litt. *ibid.* 2 Inſt. 234.

i Co. Litt. 19.

However,

However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs *of his body*, and therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care to aliene as soon as they had performed the condition by having issue; and afterwards re-purchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees: which things, says sir Edward Coke [k], though they seem antient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances, as are not within the statutes of entail, and therefore remain as at the common law (5).

[112] THE inconveniences, which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtile finesse of construction, (for such it undoubtedly was) in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second [l], (commonly called the statute *de donis conditionalibus*) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the antient feodal restraints which were originally laid on alienations, by

k 1 Inst. 19.

l 13 Edw. I. c. 1.

(5) See page 113, *post*.

enacting,

enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

UPON the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail*[m]; and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion[n]. And hence it is that Littleton tells us[o], that tenant in fee-tail is by virtue of the statute of Westminster the second.

HAVING thus shewn the *original* of estates tail, I now proceed to consider, *what things* may, or may not, be entailed under the statute *de donis*. *Tenements* is the only word used [113] in the statute: and this sir Edward Coke[p] expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as, rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed[q]. But mere personal chattels, which savour not at all of the realty, cannot be entailed. Neither

m The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists; (See Crag. *l.* 1. *t.* 10. §24, 25.) among whom it signified any mutilated or truncated inheritance, from which the heirs general were *cut* off (6); being derived from the barbarous verb *taliare*, to cut; from which the French *tailler* and the Italian *tagliare* are formed; (Spelm. *Gloss.* 531.)

n 2 Inst. 335.

o § 13.

p 1 Inst. 19, 20.

q 7 Rep. 33.

(6) Or is it not rather called so because it is a part *cut* out of the whole?

can an office, which merely relates to ſuch perſonal chattels; nor an annuity, which charges only the perſon, and not the lands, of the grantor. But in theſe laſt, if granted to a man and the heirs of his body, the grantee hath ſtill a fee conditional at common law, as before the ſtatute; and by his alienation (after iſſue born) may bar the heir or reverſioner[r] (7). An eſtate to a man and his heirs for another's life cannot be entailed[s]: for this is ſtrictly no eſtate of inheritance, (as will appear hereafter) and therefore not within the ſtatute *de donis* (8). Neither can a copyhold eſtate be entailed by virtue of the *ſtatute*; for that would tend to encroach upon and reſtrain the will of the lord: but, by the *ſpecial cuſtom* of the manor, a copyhold may be limited to the heirs of the body[t]; for here the cuſtom aſcertains and interprets the lord's will (9).

NEXT, as to the ſeveral *ſpecies* of eſtates-tail, and how they are reſpectively created. Eſtates-tail are either *general* or *ſpecial*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*: which is called

[r] Co. Litt. 19, 20.
[s] 2 Vern. 225.
[t] 3 Rep. 8.

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(7) If an annuity is granted out of perſonal property to a man and the heirs of his body, it is a fee-conditional at common law, and there can be no remainder or further limitation of it; and when the grantee has iſſue, he has the full power of alienation, and of barring the poſſibility of it's reverting to the grantor by the extinction of his iſſue. 2 *Veſ.* 170. 1 *Bro.* 325.

But out of a term for years, or any perſonal chattel, except in the inſtance of an annuity, neither a fee-conditional nor an eſtate-tail can be created; for if they are granted or deviſed by ſuch words as would convey an eſtate-tail in real property, the grantee or deviſee has the entire and abſolute intereſt without having iſſue; and as ſoon as ſuch an intereſt is veſted in any one, all ſubſequent limitations of conſequence become null and void. 1 *Bro.* 274. *Harg. Co. Litt.* 20. *Fearne*, 345. 3*d ed.*

(8) See page 260. *poſt.*

(9) See page 372. *poſt.*

tail-

tail-general, becauſe, how often ſoever ſuch donee in tail be married, his iſſue in general by all and every ſuch marriage is, in ſucceſſive order, capable of inheriting the eſtate-tail, *per formam doni* [u]. Tenant in tail-ſpecial is where the gift is reſtrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen ſeveral ways [w]. I ſhall inſtance in only one; as where [114] lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten:* here no iſſue can inherit, but ſuch ſpecial iſſue as is engendered between them two; not ſuch as the huſband may have by another wife: and therefore it is called ſpecial tail. And here we may obſerve, that the words of inheritance (to him and his *heirs)* give him an eſtate in fee; but they being heirs *to be by him begotten*, this makes it a fee-tail; and the perſon being alſo limited, on whom ſuch heirs ſhall be begotten, (viz. *Mary his preſent wife)* this makes it a fee-tail ſpecial.

ESTATES, in general and ſpecial tail, are farther diverſified by the diſtinction of ſexes in ſuch entails; for both of them may either be in tail *male* or tail *female*. As if lands be given to a man, and his *heirs male of his body begotten*, this is an eſtate in tail male general; but if to a man and the heirs *female of his body on his preſent wife begotten*, this is an eſtate in tail female ſpecial. And, in caſe of an entail male, the heirs female ſhall never inherit, nor any derived from them; nor *e converſo*, the heirs male, in caſe of a gift in tail female [x]. Thus, if the donee in tail male hath a daughter, who dies leaving a ſon, ſuch grandſon in this caſe cannot inherit the eſtate-tail; for he cannot deduce his deſcent wholly by heirs male [y]. And as the heir male muſt convey his deſcent wholly by males, ſo muſt the heir female wholly by females. And therefore if a man hath two eſtates-tail, the one in tail male, the other in tail female; and he hath iſſue a daughter, which daughter hath iſſue a ſon; this grandſon can ſucceed to neither

[u] Litt. § 14, 15.
[w] *Ibid.* § 16. 26, 27, 28, 29.
[x] *Ibid.* § 21, 22.
[y] *Ibid.* § 24.

of the estates: for he cannot convey his descent wholly either in the male or female line[z].

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feodal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular
[115] the fee is limited. If therefore either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs[a]. So, on the other hand, a gift to a man, and his *heirs male*, or *female*, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue[b]. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression[c] (10).

THERE is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio*, or *frankmarriage*. These are defined[d] to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now by such gift, though nothing but the word *frankmarriage* is

[z] Co. Litt. 25.
[a] *Ibid.* 20.
[b] Litt. § 31. Co. Litt. 27.
[c] Co. Litt. 9. 27.
[d] Litt. § 17.

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(10) Or to a man and his children, if he has no children at the time of the devise (6 *Co.* 17.); or to a man and his posterity (*H. Bl.* 447.); or by any other words, which shew an intention to restrain the inheritance to the descendents of the devisee. See 381. *post.*

expressed,

expreſſed, the donees ſhall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in ſpecial tail. For this one word, *frankmarriage*, does *ex vi termini* not only create an inheritance, like the word *frankalmoign*, but likewiſe limits that inheritance; ſupplying not only words of deſcent, but of procreation alſo. Such donees in frankmarriage are liable to no ſervice but fealty; for a rent reſerved thereon is void, until the fourth degree of conſanguinity be paſt between the iſſues of the donor and donee [e].

THE *incidents* to a tenancy in tail, under the ſtatute Weſtm. 2. are chiefly theſe [f]. 1. That a tenant in tail may commit *waſte* on the eſtate-tail, by felling timber, pulling down houſes, or the like, without being impeached, or [116] called to account, for the ſame. 2. That the wife of the tenant in tail ſhall have her *dower*, or thirds of the eſtate-tail. 3. That the huſband of a female tenant in tail may be tenant by the *curteſy* of the eſtate-tail. 4. That an eſtate-tail may be *barred*, or deſtroyed by a fine, by a common recovery, or by lineal warranty deſcending with aſſets to the heir. All which will hereafter be explained at large.

THUS much for the nature of eſtates tail: the eſtabliſhment of which family law (as it is properly ſtiled by Pigott [g]) occaſioned infinite difficulties and diſputes [h]. Children grew diſobedient when they knew they could not be ſet aſide: farmers were ouſted of their leaſes made by tenants in tail; for, if ſuch leaſes had been valid, then under colour of long leaſes the iſſue might have been virtually diſinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his eſtate with their payment, he might alſo have defeated his iſſue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchaſers of the lands they had fairly bought; of ſuits in conſequence of which our antient books are full: and

[e] Litt. § 19, 20.
[f] Co. Litt. 224.
[g] Com. Recov. 5.
[h] 1 Rep. 131.

treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law: and almost universally considered as the common grievance of the realm [i]. But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature; and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV; which were then openly declared by the judges to be a sufficient bar of an estate-tail [k].
[117] For though the courts had, so long before as the reign of Edward III, very frequently hinted their opinion that a bar might be effected upon these principles [l], yet it never was carried into execution; till Edward IV observing [m] (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court [n]: wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind of *pia fraus*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to re-

i Co. Litt. 19. Moor. 156. 10 Rep. 38.

k 1 Rep. 131. 6 Rep. 40.

l 10 Rep. 37, 38.

m Pigott. 8.

n Year book. 12 Edw. IV. 14. 19. Fitzh. *Abr. tit faux recov.* 20. Bro. *Abr. ibid.* 30. *tit. recov. in value*, 19. *tit. taile* 36.

peal;

peal: and, that theſe recoveries, however clandeſtinely introduced, are now become by long uſe and acquieſcence a moſt common aſſurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may diſpoſe of his lands and tenements: ſo that no court will ſuffer them to be ſhaken or reflected on, and even acts of parliament[o] have by a ſidewind countenanced and eſtabliſhed them.

THIS expedient having greatly abridged eſtates-tail with regard to their duration, others were ſoon invented to ſtrip them of other privileges. The next that was attacked was their freedom from forfeitures for treaſon. For, notwithſtanding the large advances made by recoveries, in the compaſs of about threeſcore years, towards unfettering theſe inheritances, and thereby ſubjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently re- [118]
ſettled in a ſimilar manner to ſuit the convenience of families, had addreſs enough to procure a ſtatute[p], whereby all eſtates of inheritance (under which general words eſtates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treaſon.

THE next attack which they ſuffered in order of time, was by the ſtatute 32 Hen. VIII. c. 28. whereby certain leaſes made by tenants in tail, which do not tend to the prejudice of the iſſue, were allowed to be good in law, and to bind the iſſue in tail (11). But they received a more violent blow, in the ſame ſeſſion of parliament, by the conſtruction put upon the ſtatute of fines[q], by the ſtatute 32 Hen. VIII. c. 36. which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other perſons, claiming under ſuch entail. This was evidently agreeable to the intention of Henry VII, whoſe policy it was (before

[o] 11 Hen. VII. c. 20. 7 Hen. VIII. c. 4. 34 & 35 Hen. VIII. c. 20. 14 Eliz. c. 8. 4 & 5 Ann. c. 16. 14 Geo. II. c. 20.

[p] 26 Hen. VIII. c. 13.

[q] 4 Hen. VII. c. 24.

(11) See page 319. *poſt*.

common recoveries had obtained their full ſtrength and authority) to lay the road as open as poſſible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the oppoſite reaſons, were not eaſily brought to conſent to ſuch a proviſion, it was therefore couched, in his act, under covert and obſcure expreſſions. And the judges, though willing to conſtrue that ſtatute as favourably as poſſible for the defeating of entailed eſtates, yet heſitated at giving fines ſo extenſive a power by mere implication, when the ſtatute *de donis* had expreſsly declared, that they ſhould *not* be a bar to eſtates-tail. But the ſtatute of Henry VIII, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and eſtabliſhed that intention. Yet, in order to preſerve the property of the crown from any danger of infringement, all eſtates-tail created by the crown, and of which the crown has the reverſion, are excepted out of this ſtatute. And the ſame was done with regard to common recoveries, by the ſtatute 34 & 35 Hen. VIII. c. 20. which enacts, that no feigned recovery had
[119] againſt tenants in tail, where the eſtate was created by the crown [r], and the remainder or reverſion continues ſtill in the crown, ſhall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with reſpect to ordinary eſtates-tail, where the royal prerogative is not concerned.

LASTLY, by a ſtatute of the ſucceeding year [s], all eſtates-tail are rendered liable to be charged for payment of debts due to the king by record or ſpecial contract; as ſince, by the bankrupt laws [t], they are alſo ſubjected to be ſold for the debts contracted by a bankrupt. And, by the conſtruction put on the ſtatute 43 Eliz. c. 4. an appointment [u] by tenant in tail of the lands entailed, to a charitable uſe, is good without fine or recovery.

ESTATES-TAIL, being thus by degrees unfettered, are now reduced again to almoſt the ſame ſtate, even before iſſue born,

[r] Co. Litt. 372.

[s] 33 Hen. VIII. c. 39. § 75.

[t] Stat. 21 Jac. I. c. 19.

[u] 2 Vern. 453. Chan. Prec. 16.

born, as conditional fees were in at common law, after the condition was performed, by the birth of iſſue. For, firſt, the tenant in tail is now enabled to aliene his lands and tenements by fine, by recovery, or by certain other means; and thereby to defeat the intereſt as well of his own iſſue, though unborn, as alſo of the reverſioner, except in the caſe of the crown: ſecondly, he is now liable to forfeit them for high treaſon: and, laſtly, he may charge them with reaſonable leaſes, and alſo with ſuch of his debts as are due to the crown on ſpecialties, or have been contracted with his fellow-ſubjects in a courſe of extenſive commerce.

CHAPTER THE EIGHTH.

OF FREEHOLDS, NOT OF INHERITANCE.

WE are next to difcourfe of fuch eftates of freehold, as are not of inheritance, but *for life* only. And of thefe eftates for life, fome are *conventional*, or exprefsly created by the act of the parties; others merely *legal*, or created by conftruction and operation of law [a]. We will confider them both in their order.

I. ESTATES for life, exprefsly created by deed or grant (which alone are properly conventional), are where a leafe is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other perfon, or for more lives than one: in any of which cafes he is ftiled tenant for life; only, when he holds the eftate by the life of another, he is ufually called tenant *pur auter vie* [b]. Thefe eftates for life are, like inheritances, of a feodal nature; and were, for fome time, the higheft eftate that any man could have in a feud, which (as we have before feen [c]) was not in it's original hereditary. They are given or conferred by the fame feodal rights and folemnities, the fame inveftiture or livery of feifin, as fees themfelves are; and they are held by fealty, if demanded, and fuch conventional rents and fervices as the lord or leffor, and his tenant or leffee, have agreed on.

[a] Wright. 190. [b] Litt. § 56. [c] pag. 55.

ESTATES for life may be created, not only by the expreſs words before mentioned, but alſo by a general grant, without defining or limiting any ſpecific eſtate. As, if one grants to A. B. the manor of Dale, this makes him tenant for life[d]. For though, as there are no words of inheritance, or *heirs*, mentioned in the grant, it cannot be conſtrued to be a fee, it ſhall however be conſtrued to be as large an eſtate as the words of the donation will bear, and therefore an eſtate for life. Alſo ſuch a grant at large, or a grant for term of life generally, ſhall be conſtrued to be an eſtate for the life *of the grantee*[e]; in caſe the grantor hath authority to make ſuch a grant: for an eſtate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken moſt ſtrongly againſt the grantor[f], unleſs in the caſe of the king.

SUCH eſtates for life will, generally ſpeaking, endure as long as the life for which they are granted: but there are ſome eſtates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an eſtate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in theſe, and ſimilar caſes, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the reſpective eſtates are abſolutely determined and gone[g]. Yet, while they ſubſiſt, they are reckoned eſtates for life; becauſe, the time for which they will endure being uncertain, they may by poſſibility laſt for life, if the contingencies upon which they are to determine do not ſooner happen. And, moreover, in caſe an eſtate be granted to a man for his life, generally, it may alſo determine by his *civil* death; as if he enters into a monaſtery, whereby he is dead in law[h]: for which reaſon in conveyances the grant is uſually made "for the term of a man's *natural* life;" which can only determine by his *natural death*[i].

[d] Co. Litt. 42.
[e] *Ibid.*
[f] *Ibid.* 36.
[g] Co. Litt. 42. 3 Rep. 20.
[h] 2 Rep. 48.
[i] See Vol. I. pag. 132.

THE

THE *incidents* to an eſtate for life, are principally the following; which are applicable not only to that ſpecies of tenants for life, which are expreſsly created by deed; but alſo to thoſe, which are created by act and operation of law.

1. EVERY tenant for life, unleſs reſtrained by covenant or agreement, may of common right take upon the land demiſed to him reaſonable *eſtovers* [k] or *botes* [l]. For he hath a right to the full enjoyment and uſe of the land, and all it's profits, during his eſtate therein. But he is not permitted to cut down timber or do other waſte upon the premiſes [m]: for the deſtruction of ſuch things, as are not the temporary profits of the tenement, is not neceſſary for the tenant's complete enjoyment of his eſtate; but tends to the permanent and laſting loſs of the perſon entitled to the inheritance (1).

2. TENANT for life, or his repreſentatives, ſhall not be prejudiced by any ſudden determination of his eſtate, becauſe ſuch a determination is contingent and uncertain [n]. Therefore if a tenant for his own life ſows the lands, and dies before harveſt, his executors ſhall have the *emblements*, or profits of the crop: for the eſtate was determined by the *act of God;* and it is a maxim in the law, that *actus Dei nemini facit injuriam.* The repreſentatives therefore of the tenant for life ſhall have the emblements, to compenſate for the labour and expence of tilling, manuring, and ſowing the lands; and alſo for the encouragement of huſbandry, which being a public benefit, tending to the encreaſe and plenty of proviſions, ought to have the utmoſt ſecurity and privilege that the law can give it. Wherefore by the feodal law, if a tenant for life died between the beginning of September and

k See pag. 35.

l Co. Litt. 41.

m *Ibid.* 53.

n *Ibid.* 55.

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(1) See p. 283, *poſt*, in what caſes the tenant for life may cut down timber, and commit what in law is called waſte.

the end of February, the lord, who was entitled to the reversion, was alſo entitled to the profits of the whole year; but, if he died between the beginning of March and the end of Auguſt, the heirs of the tenant received the whole [o]. [123]
From hence our law of emblements ſeems to have been derived, but with very conſiderable improvements. So it is alſo, if a man be tenant for the life of another, and *ceſtuy que vie*, or he on whoſe life the land is held, dies after the corn ſown, the tenant *pur auter vie* ſhall have the emblements. The ſame is alſo the rule, if a life-eſtate be determined by the *act of law*. Therefore, if a leaſe be made to huſband and wife during coverture, (which gives them a determinable eſtate for life) and the huſband ſows the land, and afterwards they are divorced *a vinculo matrimonii*, the huſband ſhall have the emblements in this caſe; for the ſentence of divorce is the act of law [p]. But if an eſtate for life be determined by the tenant's *own act*, (as, by forfeiture for waſte committed; or, if a tenant during widowhood thinks proper to marry) in theſe, and ſimilar caſes, the tenants, having thus determined the eſtate by their own acts, ſhall not be entitled to take the emblements [q]. The doctrine of emblements extends not only to corn ſown, but to roots planted, or other annual artificial profit, but it is otherwiſe of fruit-trees, graſs, and the like; which are not planted annually at the expenſe and labour of the tenant, but are either a permanent, or natural, profit of the earth [r]. For when a man plants a tree, he cannot be preſumed to plant it in contemplation of any preſent profit; but merely with a proſpect of it's being uſeful to himſelf in future, and to future ſucceſſions of tenants. The advantages alſo of emblements are particularly extended to the parochial clergy by the ſtatute 28 Hen. VIII. c. 11 (2). For all perſons, who are preſented to any eccleſiaſtical benefice, or

[o] *Feud. l.* 2. *t.* 28.
[p] 5 Rep. 116.
[q] Co. Litt. 55.
[r] Co. Litt. 55, 56. 1 Roll. Abr. 728.

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(2) That ſtatute enables an incumbent to bequeath by will, the corn and grain growing upon the glebe-land.

to

to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

3. A THIRD incident to estates for life relates to the under-tenants or lessees. For they have the same, nay greater indulgences than their lessors, the original tenants for life. The same; for the law of estovers and emblements, with re-
[124] gard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place [s]: and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee who is a third person. As in the case of a woman who holds *durante viduitate*: her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger and could not prevent her [t]. The lessees of tenants for life had also at the common law another most unreasonable advantage; for, at the death of their lessors the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to any body for the occupation of the land since the last quarter day, or other day assigned for payment of rent [u]. To remedy which it is now enacted [v], that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of rent, from the last day of payment to the death of such lessor.

II. THE next estate for life is of the legal kind, as contradistinguished from conventional; *viz.* that of tenant *in tail after possibility of issue extinct*. This happens, where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant in tail after pos-

[s] Co. Litt. 55.
[t] Cro. Eliz. 461. 1 Roll. Abr. 727.
[u] 10 Rep. 127.
[v] Stat. 11 Geo. II. c. 19. § 15.

ſibility of iſſue extinct. As, where one has an eſtate to him and his heirs on the body of his preſent wife to be begotten, and the wife dies without iſſue [w]: in this caſe the man has an eſtate-tail, which cannot poſſibly deſcend to any one; and therefore the law makes uſe of this long periphraſis, as abſolutely neceſſary to give an adequate idea of his eſtate. For if it had called him barely *tenant in fee-tail ſpecial*, that would not have diſtinguiſhed him from others; and beſides [125] he has no longer an eſtate of inheritance, or fee [x], for he can have no heirs capable of taking *per formam doni*. Had it called him *tenant in tail without iſſue*, this had only related to the preſent fact, and would not have excluded the poſſibility of future iſſue. Had he been ſtiled *tenant in tail without poſſibility of iſſue*, this would exclude time paſt as well as preſent, and he might under this deſcription never have had any poſſibility of iſſue. No definition therefore could ſo exactly mark him out, as this of tenant *in tail after poſſibility of iſſue extinct*, which (with a preciſion peculiar to our own law) not only takes in the poſſibility of iſſue in tail which he once had, but alſo ſtates that this poſſibility is now extinguiſhed and gone.

THIS eſtate muſt be created by the act of God, that is, by the death of that perſon out of whoſe body the iſſue was to ſpring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they ſhall neither of them have this eſtate, but be barely tenants for life, notwithſtanding the inheritance once veſted in them [y]. A poſſibility of iſſue is always ſuppoſed to exiſt, in law, unleſs extinguiſhed by the death of the parties; even though the donees be each of them an hundred years old [z].

THIS eſtate is of an amphibious nature, partaking partly of an eſtate-tail, and partly of an eſtate for life. The tenant

w Litt. § 32.

x 1 Roll. Rep. 184. 11 Rep. 80.

y Co. Litt. 28.

z Litt. § 34. Co. Litt. 28.

is,

is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as, not to be puniſhable for waſte, &c.[a] (3): or, he is tenant in tail, with many of the reſtrictions of a tenant for life; as, to forfeit his eſtate if he alienes it in fee-ſimple[b]: whereas ſuch alienation by tenant in tail, though voidable by the iſſue, is no forfeiture of the eſtate to the reverſioner: who is not concerned in intereſt,
[126] till all poſſibility of iſſue be extinct. But, in general, the law looks upon this eſtate as equivalent to an eſtate for life only; and, as ſuch, will permit this tenant to exchange his eſtate with a tenant for life; which exchange can only be made, as we ſhall ſee hereafter, of eſtates that are equal in their nature.

III. TENANT *by the curteſy of England*, is where a man marries a woman ſeiſed of an eſtate of inheritance, that is, of lands and tenements in fee-ſimple or fee-tail; and has by her iſſue, born alive, which was capable of inheriting her eſtate. In this caſe, he ſhall, on the death of his wife, hold the lands for his life, as tenant by the curteſy of England[c].

THIS eſtate, according to Littleton, has it's denomination, becauſe it is uſed within the realm of England only; and it is ſaid in the mirrour[d] to have been introduced by king Henry the firſt; but it appears alſo to have been the eſtabliſhed law of Scotland, wherein it was called *curialitas*[e], ſo that probably our word *curteſy* was underſtood to ſignify rather an attendance upon the lord's *court* or *curtis*, (that is, being his vaſal or tenant) than to denote any peculiar favour belonging to this iſland (4). And therefore it is laid down[f] that by having

a Co. Litt. 27.
b *Ibid.* 28.
c Litt. § 35. 52.
d c. 1. § 3.
e Crag. *l.* 2. *t.* 19. § 4.
f Litt. § 90. Co. Litt. 30. 67.

(3) But although he is not puniſhable if he cuts down trees, yet they are not his property, but will belong to the firſt perſon living at the time when they are cut, who has an eſtate of inheritance, *Harg. Co. Litt.* 27. *b.* 3 *P. Wms.* 240.

(4) I ſhould rather think with Mr. Wooddeſon, that this eſtate took its name from its peculiarity to England; and that it was

 afterwards

issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone: whereas, before issue had, they must both have done it together. It is likewise used in Ireland, by virtue of an ordinance of king Henry III[g]. It also appears[h] to have obtained in Normandy; and was likewise used among the antient Almains or Germans[i]. And yet it is not generally apprehended to have been a consequence of feodal tenure[k], though I think some substantial feodal reasons may be given for it's introduction. For, if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it (5); for which reason the heir apparent of a tenant by the curtesy could [127] not be in ward to the lord of the fee, during the life of such tenant[l]. As soon therefore as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate;* and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

THERE are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife[m]. 1. The marriage must be canonical and legal.

g *Pat.* 11 *H. III. m.* 30. in 2 Bac. Abr. 659.

h *Grand Coustum.* c. 119.

i Lindenbrog. *LL. Alman. t.* 92.

k Wright. 294.

l F. N. B. 143.

m Co. Litt. 30.

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afterwards introduced into Scotland and Ireland. 2 *Woodd.* 18. Tenant by the *curtesy* of England, perhaps originally signified nothing more than tenant by the *courts* of England; as in Latin he is called *tenens per legem Angliæ*. See stat. *pro tenentibus per legem Angliæ*. App. to Ruff. 29.

(5) And this estate seems founded upon the natural and rational principle, that it is fitter that the son should be in a state of dependence upon the father, than the father upon the son.

2. The ſeiſin of the wife muſt be an actual ſeiſin, or poſſeſſion of the lands; not a bare right to poſſeſs, which is a ſeiſin in law, but an actual poſſeſſion, which is a ſeiſin in deed. And therefore a man ſhall not be tenant by the curteſy of a remainder or reverſion. But of ſome incorporeal hereditaments a man may be tenant by the curteſy, though there have been no actual ſeiſin of the wife: as in caſe of an advowſon, where the church has not become void in the life-time of the wife; which a man may hold by the curteſy, becauſe it is impoſſible ever to have actual ſeiſin of it, and *impotentia excuſat legem* [n]. If the wife be an idiot, the huſband ſhall not be tenant by the curteſy of her lands; for the king by prerogative is entitled to them, the inſtant ſhe herſelf has any title: and ſince ſhe could never be rightfully ſeiſed of the lands, and the huſband's title depends entirely upon her ſeiſin, the huſband can have no title as tenant by the curteſy [o] (6). 3. The iſſue muſt be born alive. Some have had a notion that it muſt be heard to cry; but that is a miſtake. Crying indeed is the *ſtrongeſt* evidence of it's being born alive; but it is not the *only* evidence [p]. The iſſue alſo muſt be born during the life of the mother; for, if the mother dies in labour, and the Caeſarean operation is per-
[128] formed, the huſband in this caſe ſhall not be tenant by the curteſy: becauſe, at the inſtant of the mother's death, he was clearly not entitled, as having had no iſſue born, but the land deſcended to the child, while he was yet in his mother's womb; and the eſtate being once ſo veſted, ſhall not afterwards be taken from him [q]. In gavelkind lands, a huſband may be tenant by the curteſy without having any iſſue [r] (7). But in general there muſt be iſſue born; and ſuch

[n] *Ibid.* 29.
[o] Co. Litt. 30. Plowd. 263.
[p] Dyer. 25. 8 Rep. 34.
[q] Co. Litt. 29.
[r] *Ibid.* 30.

(6) See this doubted in *Harg. Co. Litt.* 30.

(7) But a tenant by curteſy of gavelkind lands has only a moiety of the wife's eſtate, which he loſes by a ſecond marriage. *Robin. Gavelk. b.* 2. *c.* 1.

issue as is also capable of inheriting the mother's estate[s]. Therefore if a woman be tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male[t]. And this seems to be the principal reason, why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised: because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore as the husband hath never begotten any issue that can be heir to those lands (8), he shall not be tenant of them by the curtesy[u]. And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture: for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy[w]. The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate*[x], and may do many acts to charge the lands: but his estate is not *consummate* till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy[y].

IV. TENANT in *dower* is where the husband of a woman [129]
is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tene-

s Litt. § 56.
t Co. Litt. 29.
u *Ibid.* 40.
w *Ibid.* 29.
x *Ibid.* 30.
y *Ibid.*

(8) The issue in this case must be heir to the *lands*, though he is not heir to his *mother*; but he will inherit them by an immediate descent from the person last seised.

ments whereof he was ſeiſed at any time during the coverture, to hold to herſelf for the term of her natural life [z].

DOWER is called in Latin by the foreign juriſts *doarium*, but by Bracton and our Engliſh writers *dos*: which among the Romans ſignified the marriage portion, which the wife brought to her huſband; but with us is applied to ſignify this kind of eſtate, to which the civil law, in it's original ſtate, had nothing that bore a reſemblance: nor indeed is there any thing in general more different, than the regulation of landed property according to the Engliſh and Roman laws. Dower out of lands ſeems alſo to have been unknown in the early part of our Saxon conſtitution; for, in the laws of king Edmond [a], the wife is directed to be ſupported wholly out of the perſonal eſtate. Afterwards, as may be ſeen in gavelkind tenure, the widow became entitled to a conditional eſtate in one half of the lands; with a proviſo that ſhe remained chaſte and unmarried [b]; as is uſual alſo in copyhold dowers, or free bench. Yet ſome [c] have aſcribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feodal reaſon for it's invention, ſince it was not a part of the pure, primitive, ſimple law of feuds, but was firſt of all introduced into that ſyſtem (wherein it was called *triens*, *tertia* [d], and *dotalitium*) by the emperor Frederick the ſecond [e]; who was contemporary with our king Henry III. It is poſſible, therefore, that it might be with us the relic of a Daniſh cuſtom: ſince, according to the hiſtorians of that country, dower was introduced into Denmark by Swein, the father of our Canute the great, out of gratitude to the Daniſh ladies, who ſold all their
[130] jewels to ranſom him when taken priſoner by the Vandals [f]. However this be, the reaſon, which our law gives for adopting it, is a very plain and ſenſible one; for the ſuſtenance of the wife, and the nurture and education of the younger children [g].

[z] Litt. § 36.
[a] Wilk. 75.
[b] Somner. Gavelk. 51. Co. Litt. 33. Bro. *Dower*. 70.
[c] Wright. 192.
[d] Crag. *l*. 2. *t*. 22. § 9.
[e] *Ibid*.
[f] Mod. Un. Hiſt. xxxii. 91.
[g] Bract. *l*. 2. *c*. 39. Co. Litt. 30.

In treating of this eſtate, let us, firſt, conſider, *who* may be endowed; ſecondly, of *what* ſhe may be endowed; thirdly, the manner *how* ſhe ſhall be endowed; and fourthly, how dower may be *barred* or prevented.

1. WHO may be endowed. She muſt be the actual wife of the party at the time of his deceaſe. If ſhe be divorced *a vinculo matrimonii*, ſhe ſhall not be endowed; for *ubi nullum matrimonium, ibi nulla dos*[h]. But a divorce *a menſa et thoro* only doth not deſtroy the dower[i]; no, not even for adultery itſelf by the common law[k]. Yet now by the ſtatute Weſtm. 2.[l] if a woman voluntarily leaves (which the law calls eloping from) her huſband, and lives with an adulterer, ſhe ſhall loſe her dower, unleſs her huſband be voluntarily reconciled to her (9). It was formerly held, that the wife of an idiot might be endowed, though the huſband of an idiot could not be tenant by the curteſy[m]: but as it ſeems to be at preſent agreed, upon principles of ſound ſenſe and reaſon, that an idiot cannot marry, being incapable of conſenting to any contract, this doctrine cannot now take place. By the antient law the wife of a perſon attainted of treaſon or felony could not be endowed; to the intent, ſays Staunforde[n], that if the love of a man's own life cannot reſtrain him from ſuch atrocious acts, the love of his wife and children may: though Britton[o] gives it another turn: *viz.* that it is preſumed the wife was privy to her huſband's crime. However, the ſta-

h Bract. *l.* 2. *c.* 39. § 4.

i Co. Litt. 32.

k Yet, among the antient Goths, an adultereſs was puniſhed by the loſs of her *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. *l.* 3. *c.* 2.)

l 13 Edw. I. c. 34.

m Co. Litt. 31.

n P. C. b. 3. c. 3.

o c. 110.

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(9) And in a caſe where John de Camoys had aſſigned his wife, by deed, to ſir William Paynel knight, which lord Coke calls *conceſſio mirabilis et inaudita,* it was decided in parliament, a few years after the ſtatute was enacted, notwithſtanding the purgation of the adultery in the ſpiritual court, that the wife was not entitled to dower. 2 *Inſt.* 435.

tute 1 Edw. VI. c. 12. abated the rigour of the common law in this particular, and allowed the wife her dower. But a subsequent statute [p] revived this severity against the widows of traitors, who are now barred of their dower, (except in the case of certain modern treasons relating to the coin [q]) but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands [r]. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed [s]: though in Bracton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere* [t] (10)."

[131]

[p] 5 & 6 Edw. VI. c. 11.

[q] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

[r] Co. Litt. 31.

[s] Litt. § 36.

[t] *l.* 2. *c.* 9. § 3.

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(10) Lord Coke informs us, that "if the wife be past the age "of nine years at the time of her husband's death, she shall be en"dowed, of what age soever her husband be, albeit he were but "*four* years old. *Quia junior non potest dotem promereri, et virum* "*sustinere.*" This we are told by that grave and reverend judge without any remark of surprize, or reprobation. But it confirms the observation of Montesquieu in the Spirit of Laws, b. 26. c. 3. "There has been (says he) much talk of a law in England, which "permitted girls seven years old to chuse a husband. This law "was shocking two ways; it had no regard to the time when "nature gives maturity to the understanding; nor to the time "when she gives maturity to the body." It is abundantly clear, both from our law and history, that formerly such early marriages were contracted as in the present times are neither attempted nor thought of.

This was probably owing to the right which the lord possessed of putting up to sale the marriage of his infant tenant. He, no doubt, took the first opportunity of prostituting the infant to his own interest, without any regard to age or inclinations. And thus what was so frequently practised and permitted by the law, would cease even in other instances to be considered with abhorrence. If the marriage of a female was delayed till she was sixteen, this benefit was entirely lost to the lord her guardian.

Even

2. WE are next to inquire, of what a wife may be endowed. And ſhe is now by law entitled to be endowed of all lands and tenements, of which her huſband was ſeiſed in fee-ſimple or fee-tail at any time during the coverture; and of which any iſſue, which ſhe might have had, might by poſſibility have been heir [u]. Therefore if a man, ſeiſed in fee-ſimple, hath a ſon by his firſt wife, and after marries a ſecond wife, ſhe ſhall be endowed of his lands; for her iſſue might by poſſibility have been heir, on the death of the ſon by the former wife. But, if there be a donee in ſpecial tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of theſe lands, yet if Jane dies, and he marries a ſecond wife, that ſecond wife ſhall never be endowed of the lands entailed; for no iſſue, that ſhe could have, could by any poſſibility inherit them [v]. A ſeiſin in law of the huſband will be as effectual as a ſeiſin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the huſband's title to an actual ſeiſin, as it is in the huſband's power to do with regard to the wife's lands: which is one reaſon why he ſhall not be tenant by the curteſy, but of ſuch lands whereof the wife, or he himſelf in her right, was actually ſeiſed in deed [w]. The ſeiſin of the huſband, for a tranſitory inſtant only, when the ſame act which gives him the eſtate conveys [132]
it alſo out of him again, (as where by a fine, land is granted to a man, and he immediately renders it back by the ſame fine) ſuch a ſeiſin will not entitle the wife to dower [x]: for

[u] Litt. § 36. 53.
[v] *Ibid.* § 53.
[w] Co. Litt. 31.
[x] Cro. Jac. 615. 2 Rep. 67. Co. Litt. 31.

Even the 18 Eliz. c. 7. which makes it a capital crime to abuſe a conſenting female child under the age of ten years, ſeems to leave an exception for theſe marriages, by declaring only *the carnal and unlawful* knowlege of ſuch woman-child to be a felony. Hence the abolition of the feudal wardſhips and marriage at the reſtoration may perhaps have contributed not leſs to the improvement of the morals than of the liberty of the people.

the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof [y]. And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before-mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle, built for defence of the realm [z]: nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked [a]. Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free-bench [b]. But, where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower [c] (11).

3. NEXT, as to the manner in which a woman is to be endowed. There are now subsisting four species of dower; the fifth, mentioned by Littleton [d], *de la plus belle*, having

[y] This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate in fee by survivorship, in consequence of which seisin his widow had a verdict for her dower. (Cro. Eliz. 503.)

[z] Co Litt. 31. 3 Lev. 401.

[a] Co. Litt. 32. 1 Jon. 315.

[b] 4 Rep. 22.

[c] Co. Litt. 32.

[d] § 48, 49.

(11) It is now settled, that, although the husband may be tenant by the curtesy of a trust estate of inheritance, the wife is not entitled to dower out of such an estate. 3 *P. Wms*. 229. The reason assigned why the wife has not dower out of a trust estate is, that she was not endowed of a use at common law.

And from analogy to trusts it has been determined, that a wife shall not be endowed of an equity of redemption, where the estate was mortgaged in fee by the husband previous to the marriage. 1 *Bro*. 326.

been

been aboliſhed together with the military tenures, of which it was a conſequence. 1. Dower by the *common law;* or that which is before deſcribed. 2. Dower by particular *cuſtom*[e]; as that the wife ſhould have half the huſband's lands, or in ſome places the whole, and in ſome only a quarter. 3. Dower *ad oſtium eccleſiae*[f]: which is where tenant in fee-ſimple of full age, openly at the church door, where all mar- [133] riages were formerly celebrated, after affiance made and (ſir Edward Coke in his tranſlation of Littleton adds) troth plighted between them, doth endow his wife with the whole, or ſuch quantity as he ſhall pleaſe, of his lands; at the ſame time ſpecifying and aſcertaining the ſame; on which the wife, after her huſband's death, may enter without farther ceremony. 4. Dower *ex aſſenſu patris*[g]; which is only a ſpecies of dower *ad oſtium eccleſiae*, made when the huſband's father is alive, and the ſon by his conſent, expreſsly given, endows his wife with parcel of his father's lands. In either of theſe caſes, they muſt (to prevent frauds) be made[h] *in facie eccleſiae et ad oſtium eccleſiae; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandeſtina fuere conjugia.*

It is curious to obſerve the ſeveral revolutions which the doctrine of dower has undergone, ſince it's introduction into England. It ſeems firſt to have been of the nature of the dower in gavelkind, before-mentioned; *viz.* a moiety of the huſband's lands, but forfeitable by incontinency or a ſecond marriage. By the famous charter of Henry I, this condition, of widowhood and chaſtity, was only required in caſe the huſband left any iſſue[i]: and afterwards we hear no more of it. Under Henry the ſecond, according to Glanvil[k], the dower *ad oſtium eccleſiae* was the moſt uſual ſpecies of dower; and here, as well as in Normandy[l], it was binding

[e] Litt. § 37.

[f] *Ibid.* § 39.

[g] Litt. § 40.

[h] Bracton. *l.* 2, *c.* 49. § 4.

[i] *Si mortuo viro uxor ejus remanſerit, et ſine liberis fuerit, dotem ſuam habebit; ſi vero uxor cum liberis remanſerit, dotem quidem habebit, dum corpus ſuum legitime ſervaverit.* (*Cart. Hen. I. A. D.* 1101. Introd. to great charter. *edit. Oxon.* pag. iv.)

[k] *l.* 6. *c.* 1. & 2.

[l] *Gr. Couſtum. c.* 101.

ing upon the wife, if by her consented to at the time of marriage. Neither, in those days of feodal rigor, was the husband allowed to endow her *ad ostium ecclesiae* with more than the third part of the lands whereof he then was seised, though he might endow her with less; lest by such liberal endowments the lord should be defrauded of his wardships and other feodal profits [m]. But if no specific dotation was made
[134] at the church porch, then she was endowed *by the common law* of the third part (which was called her *dos rationabilis*) of such lands and tenements, as the husband was seised of at the time of the espousals, and no other; unless he specially engaged before the priest to endow her of his future acquisitions [n]: and, if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower [o] in lands which he afterwards acquired [p]. In king John's *magna carta*, and the first charter of Henry III [q], no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217, and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his life-time [r]: yet, in case

m Bract. *l.* 2. *c.* 39. § 6.

n *De questu suo.* (Glanv. *ib.*)—*de terris acquisitis et acquirendis.* (Bract. *ib.*)

o Glanv. *c.* 2.

p When special endowments were made *ad ostium ecclesiae*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, (*quod dotat eam de tali manerio cum pertinentiis, &c.* Bract. *ibid.*) and therefore in the old York ritual (Seld. *Ux. Hebr. l.* 2. *c.* 27.) there is, at this part of the matrimonial service, the following rubric; "*sacerdos interroget dotem mulieris; et si* "*terra ei in dotem detur, tunc dicatur* "*psalmus iste, &c.*" When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis*; Bract. *ibid.*) the husband seems to have said, "with all my "lands and tenements I thee endow;" and then they all became liable to her dower. When he endowed her with personalty only, he used to say "with "all my wordly goods (or, as the Salisbury ritual has it, *with all my* "*wordly chattel*) I thee endow;" which intitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by *magna carta, cap.* 26. and will be farther treated of in the concluding chapter of this book; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

q *A. D.* 1216. *c.* 7. *edit. Oxon.*

r *Assignetur autem ei pro dote sua tertia pars totius terrae mariti sui quae sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesiae. c.* 7. (*Ibid.*)

of

of a fpecific endowment of lefs *ad oftium ecclefiae*, the widow had ftill no power to waive it after her hufband's death. And this continued to be law, during the reigns of Henry III and Edward I [s]. In Henry IV's time it was denied to be law, that a woman can be endowed of her hufband's goods and chattels [t]: and, under Edward IV, Littleton lays it down exprefsly, that a woman may be endowed *ad oftium ecclefiae* with [135] more than a third part [u]; and fhall have her election, after her hufband's death, to accept fuch dower or refufe it, and betake herfelf to her dower at common law [w]. Which ftate of uncertainty was probably the reafon, that thefe fpecific dowers, *ad oftium ecclefiae* and *ex affenfu patris*, have fince fallen into total difufe.

I PROCEED, therefore, to confider the method of endowment, or affigning dower, by the common law, which is now the only ufual fpecies. By the old law, grounded on the feodal exactions, a woman could not be endowed without a fine paid to the lord; neither could fhe marry again without his licence; left fhe fhould contract herfelf, and fo convey part of the feud, to the lord's enemy [x]. This licence the lords took care to be well paid for; and, as it feems, would fometimes force the dowager to a fecond marriage, in order to gain the fine. But, to remedy thefe oppreffions, it was provided, firft by the charter of Henry I [y], and afterwards by *magna carta* [z], that the widow fhall pay nothing for her marriage, nor fhall be diftreined to marry afrefh, if fhe choofes to live without a hufband; but fhall not however marry againft the confent of the lord; and farther, that nothing fhall be taken for affignment of the widow's dower, but that fhe fhall remain in her hufband's capital manfionhoufe for forty days after his death, during which time her dower fhall be affigned. Thefe forty days are called the widow's *quarentine*; a term made ufe of in law to fignify the

[s] Bract. *ubi fupr*. Britton. *c*. 101, 102. Flet. *l*. 5. *c*. 23. § 11, 12.
[t] *P*. 7 *Hen. IV*. 13, 14.
[u] § 39. F. N. B. 150.
[w] § 41.
[x] Mirr. c. 1. § 3.
[y] *ubi fupra*.
[z] *cap*. 7.

number

number of forty days, whether applied to this occaſion, or any other[a]. The particular lands, to be held in dower, muſt be aſſigned[b] by the heir of the huſband, or his guardian; not only for the ſake of notoriety, but alſo to entitle the lord of the fee to demand his ſervices of the heir, in reſpect of the lands ſo holden. For the heir by this entry becomes tenant
[136] thereof to the lord, and the widow is immediate tenant to the heir, by a kind of ſubinfeudation, or under-tenancy, completed by this inveſtiture or aſſignment; which tenure may ſtill be created, notwithſtanding the ſtatute of *quia emptores*, becauſe the heir parts not with the fee-ſimple, but only with an eſtate for life. If the heir or his guardian do not aſſign her dower within the term of quarentine, or do aſſign it unfairly, ſhe has her remedy at law, and the ſheriff is appointed to aſſign it[c]. Or if the heir (being under age) or his guardian aſſign more than ſhe ought to have, it may be afterwards remedied by writ of *admeaſurement* of dower[d]. If the thing of which ſhe is endowed be diviſible, her dower muſt be ſet out by metes and bounds; but if it be indiviſible, ſhe muſt be endowed ſpecially; as of the third preſentation to a church, the third toll-diſh of a mill, the third part of the profits of an office, the third ſheaf of tithe, and the like[e].

UPON preconcerted marriages, and in eſtates of conſiderable conſequence, tenancy in dower happens very ſeldom: for, the claim of the wife to her dower at the common law diffuſing itſelf ſo extenſively, it became a great clog to alienations, and was otherwiſe inconvenient to families. Wherefore, ſince the alteration of the antient law reſpecting dower *ad oſtium eccleſiae*, which hath occaſioned the entire diſuſe of that ſpecies of dower, jointures have been introduced in their ſtead, as a bar to the claim at common law. Which leads me to inquire, laſtly,

[a] It ſignifies, in particular, the forty days, which perſons coming from infected countries are obliged to wait, before they are permitted to land in England.

[b] Co. Litt. 34, 35.

[c] Co. Litt. 34, 35.

[d] F. N. B. 148. Finch. L. 314. Stat. Weſtm. 2. 13 Edw. I. c. 7.

[e] Co. Litt. 32.

4. How

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treaſon of her huſband, and other diſabilities before-mentioned, but alſo by detaining the title deeds, or evidences of the eſtate from the heir, until ſhe reſtores them [f]: and, by the ſtatute of Gloceſter [g], if a dowager alienes the land aſſigned her for dower ſhe forfeits it *ipſo* [137] *facto*, and the heir may recover it by action. A woman alſo may be barred of her dower, by levying a fine, or ſuffering a recovery of the lands, during her coverture [h]. But the moſt uſual method of barring dowers is by jointures, as regulated by the ſtatute 27 Hen. VIII. c. 10.

A JOINTURE, which, ſtrictly ſpeaking, ſignifies a joint eſtate, limited to both huſband and wife, but in common acceptation extends alſo to a ſole eſtate, limited to the wife only, is thus defined by ſir Edward Coke [i]; "a competent "livelihood of freehold for the wife, of lands and tene- "ments; to take effect, in profit or poſſeſſion, preſently after "the death of the huſband; for the life of the wife at leaſt." This deſcription is framed from the purview of the ſtatute 27 Hen. VIII. c. 10. before-mentioned; commonly called the ſtatute of *uſes*, of which we ſhall ſpeak fully hereafter. At preſent I have only to obſerve, that before the making of that ſtatute, the greateſt part of the land of England was conveyed to uſes; the property or poſſeſſion of the ſoil being veſted in one man, and the *uſe*, or profits thereof, in another; whoſe directions, with regard to the diſpoſition thereof, the former was in conſcience obliged to follow, and might be compelled by a court of equity to obſerve. Now, though a huſband had the *uſe* of lands in abſolute fee-ſimple, yet the wife was not entitled to any dower therein; he not being *ſeiſed* thereof: wherefore it became uſual, on marriage, to ſettle by expreſs deed ſome ſpecial eſtate to the uſe of the huſband and his wife, for their lives, in joint-tenancy, or jointure; which ſettlement would be a proviſion for the wife in caſe ſhe

f *Ibid*. 39.
g 6 Edw. I. c. 7.
h Pig. of recov. 66.
i 1 Inſt. 36.

ſurvived

survived her husband. At length the statute of uses ordained, that such as had the *use* of lands, should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same statute provided that
[138] upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower[k]. But then these four requisites must be punctually observed, 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be (12), in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiae*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture (13). And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then

[k] 4 Rep. 1, 2.

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(12) Or it may be averred to be, 4 Rep. 3. An assurance was made to a woman, to the intent it should be for her jointure, but it was not so expressed in the deed. And the opinion of the court was, that it might be averred that it was for a jointure, and that such averment was traversable. *Owen*, 33.

(13) And where a devise is expressed to be given in lieu and satisfaction of dower, or where that is the clear and manifest intention of the testator, the wife shall not have both, but shall have her choice. *Harg. Co. Litt.* 36. *b.*

(by the provisions of the same statute) have her dower *pro tanto* at the common law[l] (14).

THERE are some advantages attending tenants in dower that do not extend to jointresses; and so *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrein for his debt; if contracted during the coverture[m]. But, on the other hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiae*, which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in it's primitive state: whereas no small trouble, and a very tedious method of proceeding, [139]

l These settlements, previous to marriage, seem to have been in use among the antient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account. "*Dotem non* "*uxor marito, sed uxori maritus affert:* "*intersunt parentes et propinqui, et munera probant.*" (*de mor. Germ.* c. 18.) And Cæsar (*de bello Gallico, l.* 6. c. 18.) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure. "*Viri, quantas pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis bonis, aestimatione facta, cum dotibus communicant. Hujus omnis pecuniae conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit.*" The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (*Nov.* 97.) with regard to the provision for widows among the Romans: but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

m Co. Litt. 31. a. F. N. B. 150.

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(14) It has been determined, that if a woman, who is under age at the time of marriage, agrees to a jointure and settlement in bar of her dower, and her distributive share of her husband's personal property, in case he dies intestate, she cannot afterwards waive it; but is as much bound, as if she were of age at the time of marriage. Lord Northington had decreed the contrary; but his decree was upon both points reversed. Drury *v.* Drury, 4 *Brown's P. C.* 570.

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is neceſſary to compel a legal aſſignment of dower [n]. And, what is more, though dower be forfeited by the treaſon of the huſband, yet lands ſettled in jointure remain unimpeached to the widow [o]. Wherefore ſir Edward Coke very juſtly gives it the preference, as being more ſure and ſafe to the widow, than even dower *ad oſtium eccleſiae*, the moſt eligible ſpecies of any (15).

[n] Co. Litt. 36. [o] *Ibid.* 37.

(15) A jointure is not forfeited by the adultery of the wife, as dower is; and the court of chancery will decree againſt the huſband a performance of marriage articles, though he alledges and proves that his wife lives ſeparate from him in adultery. *Cox's P. Wms.* 277.

CHAPTER THE NINTH.

OF ESTATES LESS THAN FREEHOLD.

OF eſtates that are leſs than freehold, there are three ſorts: 1. Eſtates for years: 2. Eſtates at will: 3. Eſtates by ſufferance.

I. AN eſtate for *years* is a contract for the poſſeſſion of lands or tenements, for ſome determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the leſſor and the leſſee [a], and the leſſee enters thereon [b]. If the leaſe be but for half a year, or a quarter, or any leſs time, this leſſee is reſpected as a tenant for years, and is ſtiled ſo in ſome legal proceedings; a year being the ſhorteſt term which the law in this caſe takes notice of [c]. And this may, not improperly, lead us into a ſhort digreſſion, concerning the diviſion and calculation of time by the Engliſh law.

THE ſpace of a year is a determinate and well-known period, conſiſting commonly of 365 days: for, though in

[a] We may here remark, once for all, that the terminations of "—or" and "—ee" obtain, in law, the one an active, the other a paſſive ſignification; the former uſually denoting the doer of any act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a leaſe is denominated the leſſor; and he to whom it is granted the leſſee. (Litt. § 57.)

[b] *Ibid.* 58.

[c] *Ibid.* 67.

biſſextile or leap years it conſiſts properly of 366, yet by the ſtatute 21 Hen. III the increaſing day in the leap-year, together with the preceding day, ſhall be accounted for one day only. That of a month is more ambiguous: there being, in common uſe, two ways of calculating months; either as lunar, conſiſting of twenty-eight days, the ſuppoſed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian diviſion in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unleſs otherwiſe expreſſed; not only becauſe it is always one uniform period, but becauſe it falls naturally into a quarterly diviſion by weeks. Therefore a leaſe for "twelve months" is only for forty-eight weeks; but if it be for "*a* twelvemonth" in the ſingular number, it is good for the whole year[d]. For herein the law recedes from it's uſual calculation, becauſe the ambiguity between the two methods of computation ceaſes; it being generally underſtood that by the ſpace of time called thus, in the ſingular number, a twelvemonth, is meant the whole year, conſiſting of one ſolar revolution (1). In the ſpace of a day all the twenty-four

[d] 6 Rep. 61.

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(1) In bills of exchange and promiſſory notes a month is always a calendar month; as if a bill or note is dated on the 10th of January, and made payable one month after date, it is due (the three days of grace being included) on the 13th of February.

The ſix months in caſes of *lapſe* and *quare impedits*, are alſo calendar months. 6 *Co.* 61.

It is ſomewhat remarkable, that the difference between ſix calendar months and half a year does not ſeem to have been conſidered by legal writers. Lord Coke ſays, half a year conſiſts of 182 days. 1 *Inſt.* 135. But ſix calendar months will be two or three days leſs or more than half a year, accordingly as February is reckoned, or not, one of the ſix. Lord Coke, in his report of Cateſby's caſe, clearly conſiders the *tempus ſemeſtre* to be ſix calendar months (6 *Co.* 61.); yet ſir George Croke in his report of that caſe,

hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes[e]. Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences (2). But to return to estates for years.

THESE estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to [142]
receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the antient law, be at any time defeated by a common recovery suffered by the tenant of the freehold[f]; which annihilated all leases for

[e] Co. Litt. 135. [f] Co. Litt. 46.

case, states it as confidently to consist of 182 days; and in neither report is the difference taken notice of.

From the cases in 3 *Wils.* 21. and 1 *T. R.* 159. it appears that a notice to a tenant from year to year to quit the premises, must be half a year, and not six calendar months, though the computation by the latter would be more simple and convenient; and that was understood to be the proper notice by the court of common pleas in 2 *Bl. Rep.* 1224.

(2) See 4 *T. R.* 170. where there was a difference of opinion in the court upon the question, whether a bill of exchange could be protested for non-payment on the same day that it was due, or the acceptor had the whole of the day to discharge it in?

years then ſubſiſting, unleſs afterwards renewed by the recoveror, whoſe title was ſuppoſed ſuperior to his by whom thoſe leaſes were granted.

WHILE eſtates for years were thus precarious, it is no wonder that they were uſually very ſhort, like our modern leaſes upon rack rent; and indeed we are told[g] that by the antient law no leaſes for more than forty years were allowable, becauſe any longer poſſeſſion (eſpecially when given without any livery declaring the nature and duration of the eſtate) might tend to defeat the inheritance. Yet this law, if ever it exiſted, was ſoon antiquated; for we may obſerve, in Madox's collection of antient inſtruments, ſome leaſes for years of a pretty early date, which conſiderably exceed that period[h]: and long terms, for three hundred years or a thouſand, were certainly in uſe in the time of Edward III[i], and probably of Edward I[k]. But certainly, when by the ſtatute 21 Hen. VIII. c. 15. the termor (that is, he who is entitled to the term of years) was protected againſt theſe fictitious recoveries, and his intereſt rendered ſecure and permanent, long terms began to be more frequent than before; and were afterwards extenſively introduced, being found extremely convenient for family ſettlements and mortgages: continuing ſubject, however, to the ſame rules of ſucceſſion,
[143] and with the ſame inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.

EVERY eſtate which muſt expire at a period certain and prefixed, by whatever words created, is an eſtate for years. And therefore this eſtate is frequently called a term, *terminus*, becauſe it's duration or continuance is bounded, limited, and determined: for every ſuch eſtate muſt have a certain beginning, and certain end[l]. But *id certum eſt, quod certum reddi*

g Mirror. c. 2. § 27. Co. Litt. 45, 46.

h Madox *Formulare Anglican.* n° 239. *fol.* 140. Demiſe for eighty years, 21 Ric. II. . . . . *Ibid.* n° 245. *fol.* 146. for the like term. *A. D.* 1429. . . . . *Ibid.* n° 248. *fol.* 148. for fifty years, 7 Edw. IV.

i 32 Aſſ. pl. 6. Bro. abr. t. *mordaunceſtor*. 42. *ſpoliation*. 6.

k Stat. of mortmain, 7 Edw. I.

l Co. Litt. 45.

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poteſt: therefore if a man make a leaſe to another, for ſo many years as J. S. ſhall name, it is a good leaſe for years[m]; for though it is at preſent uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this eſtate, it begins from the making, or delivery, of the leaſe[n]. A leaſe for ſo many years as J. S. ſhall live, is void from the beginning[o]; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the leaſe. And the ſame doctrine holds, if a parſon make a leaſe of his glebe for ſo many years as he ſhall continue parſon of Dale; for this is ſtill more uncertain. But a leaſe for twenty or more years, if J. S. ſhall ſo long live, or if he ſhould ſo long continue parſon, is good[p]: for there is a certain period fixed, beyond which it cannot laſt; though it may determine ſooner, on the death of J. S. or his ceaſing to be parſon there.

WE have before remarked, and endeavoured to aſſign the reaſon of, the inferiority in which the law places an eſtate for years, when compared with an eſtate for life, or an inheritance: obſerving, that an eſtate for life, even if it be *pur auter vie*, is a freehold; but that an eſtate for a thouſand years is only a chattel, and reckoned part of the perſonal eſtate[q]. Hence it follows, that a leaſe for years may be made to commence *in futuro*, though a leaſe for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas [144] next for the term of his natural life, is void. For no eſtate of freehold can commence *in futuro*; becauſe it cannot be created at common law without livery of ſeiſin, or corporal poſſeſſion of the land: and corporal poſſeſſion cannot be given of an eſtate now, which is not to commence now, but hereafter[r]. And, becauſe no livery of ſeiſin is neceſſary to a leaſe for years, ſuch leſſee is not ſaid to be *ſeiſed*, or to have true legal ſeiſin of the lands. Nor indeed does the bare leaſe

m 6 *Rep* 35.
n Co. Litt. 46.
o *Ibid.* 45.
p *Ibid.*
q *Ibid.* 46.
r 5 Rep. 94.

veſt any eſtate in the leſſee; but only gives him a right of entry on the tenement, which right is called his *intereſt in the term*, or *intereſſe termini:* but when he has actually ſo entered, and thereby accepted the grant, the eſtate is then, and not before, veſted in him, and he is *poſſeſſed*, not properly of the land, but of the term of years[s]; the poſſeſſion or ſeiſin of the *land* remaining ſtill in him who hath the freehold. Thus the word, *term*, does not merely ſignify the time ſpecified in the leaſe, but the eſtate alſo and intereſt that paſſes by that leaſe; and therefore the *term* may expire, during the continuance of the *time;* as by ſurrender, forfeiture, and the like. For which reaſon, if I grant a leaſe to A for the term of three years, and after the expiration of the ſaid *term* to B for ſix years, and A ſurrenders or forfeits his leaſe at the end of *one* year, B's intereſt ſhall immediately take effect: but if the remainder had been to B from and after the expiration of the ſaid *three years*, or from and after the expiration of the ſaid *time*, in this caſe B's intereſt will not commence till the time is fully elapſed, whatever may become of A's term[t].

TENANT for term of years hath incident to and inſeparable from his eſtate, unleſs by ſpecial agreement, the ſame eſtovers, which we formerly obſerved[u] that tenant for life was entitled to; that is to ſay, houſe-bote, fire-bote, plough-bote, and hay-bote[w]; terms which have been already explained[x].

[145] WITH regard to emblements, or the profits of lands ſowed by tenant for years, there is this difference between him, and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midſummer for ten years, and in the laſt year he ſows a crop of corn, and it is not ripe and cut before midſummer, the end of his term, the landlord ſhall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to ſow what

[s] Co. Litt. 46.
[t] *Ibid.* 45.
[u] pag. 122.
[w] Co. Litt. 45.
[x] pag. 35.

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he never could reap the profits of[y]. But where the leafe for years depends upon an uncertainty: as, upon the death of the leffor, being himfelf only tenant for life, or being a hufband feifed in right of his wife; or if the term of years be determinable upon a life or lives; in all thefe cafes, the eftate for years not being certainly to expire at a time fore-known, but merely by the act of God, the tenant, or his executors, fhall have the emblements in the fame manner that a tenant for life or his executors fhall be entitled thereto[z]. Not fo, if it determine by the act of the party himfelf: as if tenant for years does any thing that amounts to a forfeiture: in which cafe the emblements fhall go to the leffor, and not to the leffee, who hath determined his eftate by his own default[a].

II. THE fecond fpecies of eftates not freehold, are eftates at *will*. An eftate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the leffor; and the tenant by force of this leafe obtains poffeffion[b]. Such tenant hath no certain indefeafible eftate, nothing that can be affigned by him to any other; becaufe the leffor may determine his will, and put him out whenever he pleafes. But every eftate at will is at the will of both parties, landlord and tenant; fo that either of them may determine his will, and quit his connexions with the other at his own pleafure[c]. Yet this muft be underftood with fome reftriction. For, if the tenant at will fows his land, and the landlord be- [*146] fore the corn is ripe, or before it is reaped, puts him out, yet the tenant fhall have the emblements, and free ingrefs, egrefs, and regrefs, to cut and carry away the profits[d]. And this for the fame reafon, upon which all the cafes of emblements turn; *viz.* the point of uncertainty: fince the tenant could not poffibly know when his landlord would determine his will, and therefore could make no provifion againft it; and having fown the land, which is for the good of the public, upon a

y Litt. § 68.
z Co. Litt. 56.
a *Ibid.* 55.
b Litt. § 68.
c Co. Litt. 55.
d Co. Litt. 56.

reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land [e].

WHAT act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land [f], or notice must be given to the lessee [g]) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber [h], taking a distress for rent and impounding it thereon [i], or making a feoffment, or lease for years of the land to commence immediately [k]; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure [l]; or, which is *instar omnium*, the death or outlawry of either lessor or lessee [m]; puts an end to or determines the estate at will.

The law is however careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of
[147] emblements before-mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils [n]. And, if rent be payable quarterly or half yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year [o]. And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as

[e] Co. Litt. 55.
[f] *Ibid.*
[g] 1 Ventr. 248.
[h] Co. Litt. 55.
[i] *Ibid.* 57.
[k] 1 Roll. Abr. 860. 2 Lev. 88.
[l] Co. Litt. 55.
[m] 5 Rep. 116. Co. Litt. 57. 62.
[n] Litt. § 69.
[o] Salk. 414. 1 Sid. 339.

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both parties pleaſe, eſpecially where an annual rent is reſerved: in which caſe they will not ſuffer either party to determine the tenancy even at the end of the year, without reaſonable notice to the other, which is generally underſtood to be ſix months [p] (3).

THERE is one ſpecies of eſtates at will, that deſerves a more particular regard than any other; and that is, an eſtate held by copy of court roll: or, as we uſually call it, a *copyhold* eſtate. This, as was before obſerved [q], was in it's original and foundation nothing better than a mere eſtate at will. But, the kindneſs and indulgence of ſucceſſive lords of manors having permitted theſe eſtates to be enjoyed by the tenants and their heirs, according to particular cuſtoms eſtabliſhed in their reſpective diſtricts; therefore, though they ſtill are held at the will of the lord, and ſo are in general expreſſed in the court rolls to be, yet that will is qualified, reſtrained, and limited, to be exerted according to the cuſtom of the manor. This cuſtom, being ſuffered to grow up by the lord,

p This kind of leaſe was in uſe as long ago as the reign of Henry VIII. when half a year's notice ſeems to have been required to determine it. (*T.* 13 *Hen. VIII.* 15, 16.)

q pag. 93.

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(3) See page 141. *ante,* note 1. The learned Judge, in the text, tells us, the notice muſt be *ſix months*, and in the note *half a year*; but in addition to the authorities referred to by the Editor in note 1, it is *demy an,* or half a year, in the 13 Hen. VIII. 15. The notice muſt be to quit at the end of the year. 1 *T. R.* 159. The time ſpecified in the notice will be ſuppoſed to be the end of the year, unleſs the contrary is ſhewn. *Ib.* If the notice is not good for one year, it is not good for the next, it being ſuppoſed that the landlord has waived it. 2 *Bro.* 161. The defect of notice cannot be ſet up by a tenant who controverts the title of the landlord. *Ib.*

If the landlord gives notice to quit, and afterwards receives rent for the time ſubſequent to the end of the year, it is a queſtion for the jury to determine, whether it was accepted or not with an intention to waive the notice. *Cowp.* 243. But it has been determined, that a diſtreſs for ſuch rent will not admit of any other explanation, and is an unequivocal waiver of the notice. *H. Bl. Rep.* 311.

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is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom, as a tenant at will; the custom having arisen from a series of uniform wills. And therefore
[148] it is rightly observed by Calthorpe [r], that "copyholders and "customary tenants differ not so much in nature as in name: "for although some be called copyholders, some customary, "some tenants by the virge, some base tenants, some bond "tenants, and some by one name and some by another, yet "do they all agree in substance and kind of tenure: all the "said lands are holden in one general kind, that is, by cus-"tom and continuance of time; and the diversity of their "names doth not alter the nature of their tenure."

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor; which customs differ as much as the humour and temper of the respective antient lords, (from whence we may account for their great variety) such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, and hold them united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition: subject however to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulged by immemorial custom, has declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of these interests amount to freehold; for the freehold of the whole manor abides always in the lord only [s], who hath granted out the use and occupation, but not the corporeal seisin or true legal pos-

[r] on copyholds. 51. 54.

[s] Litt. § 81. 2 Inst. 325.

session,

fession, of certain parcels thereof, to these his customary tenants at will.

THE reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any [149] estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein[t]. The lords therefore, though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet not caring to manumit them entirely, might probably scruple to grant them any absolute freehold; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposed it still to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be stiled in their admissions tenants at the will of the lord,—the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest: and therefore continued and now continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs for ever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders, of free or privileged tenure, which are derived from the antient tenants in villein-socage[u], and are not said to hold *at the will of the lord*, but only *according to the custom of the manor*, there is no such absurdity in allowing them to be capable of enjoying a freehold

[t] Mirr. c. 2. § 28. Litt. § 204, 5, 6.

[u] See page 98, &c.

interest:

interest: and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves [v]; who are sometimes called *customary freeholders*, being allowed to have a freehold *interest*, though not a freehold *tenure*.

[150] HOWEVER, in common cases, copyhold estates are still ranked (for the reasons above-mentioned) among tenancies at will; though custom, which is the life of the common law, has established a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himself, in the tenements holden of the manor: nay sometimes even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and in other respects, particularly in the clearness and security of his title, to be frequently in a better situation.

III. AN estate at *sufferance*, is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will, and dies, the estate at will is thereby determined: but if the tenant continueth possession, he is tenant at sufferance [w] (4). But, no man can be tenant at sufferance against the king, to whom no *laches*, or neglect, in not entering and ousting the tenant, is ever imputed by

v Fitz. *Abr. tit. corone.* 310. *custom.* 12 *Bro. Abr. tit. custom.* 2. 17. *tenant per copie.* 22. 9 Rep. 76. Co. Litt. 59. Co. Copyh. § 32. Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. Carth. 432. Lord Raym. 1225.

w Co. Litt. 57.

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(4) A lease at will being now considered a lease from year to year, which cannot be vacated without half a year's notice to quit, upon the death of the lessor the tenant cannot be ejected without half a year's notice from his heir. 2 *T. R.* 159. And it has also been decided, that it is necessary to give that notice to the personal representative of the lessee. 3 *Wils.* 25.

law;

law: but his tenant, so holding over, is considered as an absolute intruder [x]. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant: for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger [y]: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

THUS stands the law, with regard to tenants by sufferance; and landlords are obliged in these cases to make formal entries upon their lands [z], and recover possession by the legal process [151] of ejectment: and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II. c. 28. in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in writing given, by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. And, by statute 11 Geo. II. c. 19. in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent*, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement (5).

[x] Co. Litt. 57. [y] *Ibid.* [z] 5 Mod. 384.

(5) Where a tenant has a lease for a term certain, and holds over after the expiration of it, it is not necessary for the landlord to give him any notice to quit, in order to recover possession by ejectment.

ejectment. 1 *T. R.* 53. 162. But if the landlord afterwards receives rent, or does any act by which he proves his assent to the continuance of the tenant, this turns the estate at sufferance into a tenancy from year to year. The notice by 4 Geo. II. c. 28. may be given previous to the end of the term. *Bl. Rep.* 1075. But I should think, that it may also be given afterwards, though the double value could only be recovered from the delivery of the notice, and demand of possession. The notice by the landlord must be in writing; but that by the tenant, under 11 Geo. II. c. 19. may be by parol. 3 *Burr.* 1603. The double value can only be recovered by action of debt; but the double rent may be recovered by distress or otherwise, like single rent. 1 *Bl.* 535. No length of time is necessary to the validity of these notices under the statutes, to entitle the landlord to double value, or double rent.

CHAPTER THE TENTH.

OF ESTATES UPON CONDITION.

BESIDES the feveral divifions of eftates, in point of intereft, which we have confidered in the three preceding chapters, there is alfo another fpecies ftill remaining, which is called an eftate *upon condition;* being fuch whofe exiftence depends upon the happening or not happening of fome uncertain event, whereby the eftate may be either originally created, or enlarged, or finally defeated [a]. And thefe conditional eftates I have chofen to referve till laft, becaufe they are indeed more properly qualifications of other eftates, than a diftinct fpecies of themfelves; feeing that any quantity of intereft, a fee, a freehold, or a term of years, may depend upon thefe provifional reftrictions. Eftates then upon condition, thus underftood, are of two forts: 1. Eftates upon condition *implied:* 2. Eftates upon condition *expreffed:* under which laft may be included, 3. Eftates held *in vadio gage*, or *pledge:* 4. Eftates by *ftatute merchant* or *ftatute ftaple:* 5. Eftates held by *elegit.*

I. ESTATES upon condition implied in law, are where a grant of an eftate has a condition annexed to it infeparably, from it's effence and conftitution, although no condition be expreffed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a fecret condition, that the grantee fhall duly execute his office [b], on breach of which condition

[a] Co. Litt 201.

[b] Litt. § 378.

it is lawful for the grantor, or his heirs, to ouſt him, and grant it to another perſon [c]. For an office, either public or private, may be forfeited by *miſ-uſer* or *non-uſer*, both of which are breaches of this implied condition. 1. *By miſ-uſer*, or abuſe; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-uſer*, or neglect; which in public offices, that concern the adminiſtration of juſtice, or the commonwealth, is of itſelf a direct and immediate cauſe of forfeiture: but non-uſer of a private office is no cauſe of forfeiture, unleſs ſome ſpecial damage is proved to be occaſioned thereby [d]. For in the one caſe delay muſt neceſſarily be occaſioned in the affairs of the public, which require a conſtant attention: but, private offices not requiring ſo regular and unremitted a ſervice, the temporary neglect of them is not neceſſarily productive of miſchief: upon which account ſome ſpecial loſs muſt be proved, in order to vacate theſe. Franchiſes alſo, being regal privileges in the hands of a ſubject, are held to be granted on the ſame condition of making a proper uſe of them; and therefore they may be loſt and forfeited, like offices, either by abuſe or by neglect [e].

UPON the ſame principle proceed all the forfeitures which are given by law of life eſtates and others; for any acts done by the tenant himſelf, that are incompatible with the eſtate which he holds. As if tenants for life or years enfeoff a ſtranger in fee-ſimple: this is, by the common law, a forfeiture of their ſeveral eſtates; being a breach of the condition which the law annexes thereto, *viz.* that they ſhall not attempt to create a greater eſtate than they themſelves are entitled to [f]. So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, becauſe their eſtate is determined by the breach of the condition, "that they ſhall not commit "felony," which the law tacitly annexes to every feodal donation.

c Litt. § 379.
d Co. Litt. 233.
e 9 Rep. 50.
f Co. Litt. 215.

II. AN eſtate on condition expreſſed in the grant itſelf, is where an eſtate is granted, either in fee-ſimple or otherwiſe, with an expreſs qualification annexed, whereby the eſtate granted ſhall either commence, be enlarged, or be defeated, upon performance or breach of ſuch qualification or condition [g]. Theſe conditions are therefore either *precedent*, or *ſubſequent*. Precedent are ſuch as muſt happen or be performed before the eſtate can veſt or be enlarged: ſubſequent are ſuch, by the failure or non-performance of which an eſtate already veſted may be defeated. Thus, if an eſtate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no eſtate [h] is veſted in A. Or, if a man grant to his leſſee for years, that upon payment of a hundred marks within the term he ſhall have the fee, this alſo is a condition precedent, and the fee-ſimple paſſeth not till the hundred marks be paid [i]. But if a man grant an eſtate in fee-ſimple, reſerving to himſelf and his heirs a certain rent; and that, if ſuch rent be not paid at the times limited, it ſhall be lawful for him and his heirs to re-enter, and avoid the eſtate: in this caſe the grantee and his heirs have an eſtate upon condition ſubſequent, which is defeaſible if the condition be not ſtrictly performed [k]. To this claſs may alſo be referred all baſe fees, and fee-ſimples conditional at the common law [l]. Thus an eſtate to a man and his heirs, *tenants of the manor of Dale*, is an eſtate on condition that he and his heirs continue tenants of that manor. And ſo, if a perſonal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the ſtatute of Weſtminſter the ſecond, it remains, as at common law, a fee-ſimple on condition that the grantee has heirs of his body. Upon the ſame principle depend all the determinable eſtates of freehold, which we mentioned in the eighth chapter: *as durante viduitate, &c*: theſe are eſtates upon condition that the grantees do not marry, and the like. And, on the breach of any of theſe

[g] Co. Litt. 201.
[h] Show. Parl. Caſ. 83, *&c.*
[i] Co. Litt 217.
[k] Litt. § 325.
[l] See pag. 109, 110, 111.

fubfequent conditions, by the failure of thefe contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing fole; the eftates which were refpectively vefted in each grantee are wholly determined and void.

A DISTINCTION is however made between a *condition in deed* and a *limitation*, which Littleton[m] denominates alfo a *condition in law*. For when an eftate is fo exprefsly confined and limited by the words of it's creation, that it cannot endure for any longer time than till the contingency happens upon which the eftate is to fail, this is denominated a *limitation*: as when land is granted to a man, *fo long as* he is parfon of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he fhall have made 500 *l.* and the like[n]. In fuch cafe the eftate determines as foon as the contingency happens, (when he ceafes to be parfon, marries a wife, or has received the 500 *l.*) and the next fubfequent eftate, which depends upon fuch determination, becomes immediately vefted, without any act to be done by him who is next in expectancy. But when an eftate is, ftrictly fpeaking, upon *condition in deed* (as if granted exprefsly *upon condition* to be void upon the payment of 40 *l.* by the grantor, or *fo that* the grantee continues unmarried, or *provided* he goes to York, *&c.*[o]) the law permits it to endure beyond the time when fuch contingency happens, unlefs the grantor or his heirs or affigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the eftate[p]. Yet, though ftrict words of condition be ufed in the creation of the eftate, if on breach of the condition the eftate be limited over to a third perfon, and does not immediately revert to the grantor or his reprefentatives, (as if an eftate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs) this the law conftrues to be a limitation and not a

m § 380. 1 Inft. 234.

n 10 Rep. 41.

o *Ibid.* 42.

p Litt. § 347. Stat. 32 Hen. VIII. c. 34.

condition[q]: becauſe, if it were a condition, then, upon the breach thereof, only A or his repreſentatives could avoid the eſtate by entry, and ſo D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the eſtate of B determines, and that of D commences, and he may enter on the lands, the inſtant that the failure happens. So alſo, if a man by his will deviſes land to his heir at law, on condition that he pays a ſum of money, and for non-payment deviſes it over, this ſhall be conſidered as a limitation; otherwiſe no advantage could be taken of the non-payment, for none but the heir himſelf could have entered for a breach of condition[r].

IN all theſe inſtances, of limitations or conditions ſubſequent, it is to be obſerved, that ſo long as the condition, either expreſs or implied, either in deed or in law, remains unbroken, the grantee may have an eſtate of freehold, provided the eſtate upon which ſuch condition is annexed be in itſelf of a freehold nature; as if the original grant expreſs either an eſtate of inheritance, or for life, or no eſtate at all, which is conſtructively an eſtate for life. For the breach of theſe conditions being contingent and uncertain, this uncertainty preſerves the freehold[s]; becauſe the eſtate is capable to laſt for ever, or at leaſt for the life of the tenant, ſuppoſing the condition to remain unbroken. But where the eſtate is at the utmoſt a chattel intereſt, which muſt determine at a time certain, and may determine ſooner, (as a grant for ninety-nine years, provided A, B, and C, or the ſurvivor of them, ſhall ſo long live) this ſtill continues a mere chattel, and is not, by ſuch it's uncertainty, ranked among eſtates of freehold.

THESE expreſs conditions, if they be *impoſſible* at the time of their creation, or afterwards become impoſſible by the act of God or the act of the feoffor himſelf, or if they be *contrary to law*, or *repugnant* to the nature of the eſtate, are void. In any of which caſes, if they be conditions *ſubſequent*, that

[q] 1 Ventr. 202.
[r] Cro. Eliz. 205. 1 Roll. Abr. 411.
[s] Co. Litt. 42.

is, to be performed after the eſtate is veſted, the eſtate ſhall become abſolute in the tenant. As, if a feoffment be made to a man in fee-ſimple, on condition that unleſs he goes to Rome in twenty-four hours; or unleſs he marries with Jane S. by ſuch a day; (within which time the woman dies, or the feoffor marries her himſelf) or unleſs he kills another; or in caſe he alienes in fee; that then and in any of ſuch caſes the eſtate ſhall be vacated and determine: here the condition is void, and the eſtate made abſolute in the feoffee. For he hath by the grant the eſtate veſted in him, which ſhall not be defeated afterwards by a condition either impoſſible, illegal, or repugnant[t]. But if the condition be *precedent* or to be performed before the eſtate veſts, as a grant to a man that, if he kills another or goes to Rome in a day, he ſhall have an eſtate in fee; here, the void condition being precedent, the eſtate which depends thereon is alſo void, and the grantee ſhall take nothing by the grant: for he hath no eſtate until the condition be performed[u].

THERE are ſome eſtates defeaſible upon condition ſubſequent, that require a more peculiar notice. Such are

III. ESTATES held *in vadio*, in *gage*, or pledge: which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

VIVUM *vadium*, or living pledge, is when a man borrows a ſum (ſuppoſe 200 *l.*) of another; and grants him an eſtate, as, of 20 *l. per annum*, to hold till the rents and profits ſhall repay the ſum ſo borrowed. This is an eſtate conditioned to be void, as ſoon as ſuch ſum is raiſed. And in this caſe the land or pledge is ſaid to be living: it ſubſiſts, and ſurvives the debt; and, immediately on the diſcharge of that, reſults back to the borrower[w]. But *mortuum vadium*, a dead pledge, or *mortgage*, (which is much more common than the other) is where a man borrows of another a ſpecific ſum (*e. g.* 200 *l.*)

[t] Co. Litt. 206.
[u] *Ibid.*
[w] *Ibid.* 205.

and

and grants him an eftate in fee, on condition that if he, the mortgagor, fhall repay the mortgagee the faid fum of 200 *l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the eftate fo granted in pledge; or, as is now the more ufual way, that then the mortgagee fhall reconvey the eftate to the mortgagor: in this cafe the land, which is fo put in pledge, is by law, in cafe of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's eftate in the lands is then no longer conditional, but abfolute. But, fo long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage [x]. But, as it was formerly a doubt [y], whether, by taking fuch eftate in fee, it did not become liable to the wife's dower, and other incumbrances, of the mortgagee (though that doubt has been long ago overruled by our courts of equity [z]) it therefore became ufual to grant only a long term of years by way of mortgage; with condition to be void on re-payment of the mortgage-money: which courfe has been fince pretty generally continued, principally becaufe on the death of the mortgagee fuch term becomes vefted in his perfonal reprefentatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

As foon as the eftate is created, the mortgagee may immediately enter on the lands; but is liable to be difpoffeffed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the ufual way is to agree that the mortgagor fhall hold the land till the day affigned for payment; when, in cafe of failure, whereby the eftate becomes abfolute, the mortgagee may enter upon it and take poffeffion, without any poffibility *at law*, of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpofe; and, though a mortgage be thus forfeited, and the

x Litt. § 332.
y *Ibid.* § 357. Cro. Car. 191.
z Hardr. 466.

estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate(1); paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1000 *l.* might be forfeited for non-payment of 100 *l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages [a], the fraudulent mortgagor forfeits all equity of redemption whatsoever(2). It is not how-

[a] Stat. 4 & 5 W. & M. c. 16.

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(1) In general if the mortgagee has been twenty years in possession, the court of chancery, in conformity to the time of bringing an ejectment, will not permit the mortgagor to redeem, unless during part of the time the mortgagor has been an infant or a married woman; or unless the mortgagee admits he holds the estate as a mortgage, or there is some other special circumstance, which forms an exception to the general rule. *Eq. Ca. Abr.* 313. 2 *Bro.* 399. Where two different estates are mortgaged by the owner to the same person, one cannot be redeemed without the other. *Amb.* 733.

(2) By the 4 & 5 W. & M. if any person mortgages his estate, and does not previously inform the mortgagee in writing of a prior mortgage, or of any judgment or incumbrance, which he has voluntarily brought upon the estate, the mortgagee shall hold the

estate

ever usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment(3), and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was where the possession of the thing pledged remained with the debtor[b]. But, by statute 7 Geo. II. c. 20. after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to re-assign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also [160] delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet:*" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land: "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*[c]." And the frauds which have arisen, since the exchange of these public and notorious conveyances

[b] *Pignoris appellatione eam proprie rem contineri dicimus, quae simul etiam traditur creditori. At eam, quae sine traditione nuda conventione tenetur, proprie hypothecae appellatione contineri dicimus. Inst. l.* 4. *t.* 6. § 7.

[c] *l.* 10. *c.* 8.

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estate as an absolute purchaser free from the equity redemption of the mortgagor.

(3) The mortgagee is not now obliged to bring an ejectment to recover the rents and profits of the estate, for it has been determined, that where there is a tenant in possession, by a lease prior to the mortgage, the mortgagee may at any time give him notice to pay the rent to him; and he may distrain for all the rent which is due at the time of the notice, and also for all that accrues afterwards. *Moss* v. *Gallimore, Doug.* 266. The mortgagor has no interest in the premises, but by the mere indulgence of the mortgagee; he has not even the estate of a tenant at will, for it is held he may be prevented from carrying away the emblements, or the crops which he himself has sown. *Ib.*

for more private and secret bargains, have well evinced the wisdom of our antient law (4).

IV. A FOURTH species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum vadium*

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(4) It has been said by a learned judge to be an established rule of equity, that a second mortgagee, who has the title deeds without notice of any prior incumbrance, shall be preferred, because if a mortgagee lend money upon real property without taking the title deeds, he enables the mortgagor to commit a fraud. 1 *T. R.* 762. But lord Thurlow afterwards observed upon this, that he did not conceive that the not taking the deeds was alone sufficient to postpone the first mortgagee; if it were so, there could be no such thing as a mortgage of a reversion; and he held that the second mortgagee in possession of the title deeds, was preferred only in cases where the first had been guilty of fraud or of gross negligence. 2 *Bro.* 652.

But I should be inclined to think that fraud or gross negligence would be presumed, unless the mortgagee could shew that it was impossible for him to obtain the possession of the title deeds, or that he had used the due and necessary diligence for that purpose.

Whatever may be the value of the estate, it is of great importance to those who lend money upon real security, to be certain that there is no prior mortgage upon the estate; for it has been long settled, that if a third mortgagee, who at the time of his mortgage had no notice of the second, purchases the first mortgage even pending a bill filed by the second to redeem the first, both the first and third mortgages shall be paid out of the estate, before any share of it can be appropriated to the second: the reason assigned is, that the third, by thus obtaining the legal estate, has both law and equity on his side, which supersede the equity of the second. And even lord Hale held it right, that the third should seise what he called the *tabula in naufragio*, a plank in the shipwreck, and thus leave the second to perish. But among mortgagees, where none has the legal estate, the rule in equity is, *qui prior est tempore, potior est jure.* 2 *P. Wms.* 491. 1 *Bro.* 63.

As this is the equity which is intelligible to ordinary understandings, if it were not presumptuous to reflect a censure upon a doctrine so long sanctioned by illustrious names, it might be observed that the equity of the second ought to have outweighed both the law and equity of the third; for it can hardly be reconciled with substantial justice, that the third by any contrivance or combination should be

permitted

before-mentioned, or eſtate held till the profits thereof ſhall diſcharge a debt liquidated or aſcertained. For both the ſtatute merchant and ſtatute ſtaple are ſecurities for money; the one entered into before the chief magiſtrate of ſome trading town, purſuant to the ſtatute 13 Edw. I. *de mercatoribus*, and thence called a ſtatute merchant; the other purſuant to the ſtatute 27 Edw. III. c. 9. before the mayor of the ſtaple, that is to ſay, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns[d], from whence this ſecurity is called a ſtatute ſtaple. They are both, I ſay, ſecurities for debts acknowleged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be impriſoned, and his goods ſeiſed in ſatisfaction of the debt, but alſo his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be ſatisfied: and, during ſuch time as the creditor ſo holds the lands, he is tenant by ſtatute merchant or ſtatute ſtaple. There is alſo a ſimilar ſecurity, the recognizance in the nature of a ſtatute ſtaple, acknowleged before either of the chief juſtices, or (out of term) before their ſubſtitutes, the mayor of the ſtaple at Weſtminſter and the recorder of London; whereby the benefit of this mercantile tranſaction is extended to all the king's ſubjects in general, by virtue of the ſtatute 23 Hen. VIII. c. 6. amended by 8 Geo. I. c. 25. which direct ſuch recognizances to be enrolled and certified into chancery. But theſe by the ſtatute of frauds, 29 Car. II. c. 3. are only binding upon the lands in the hands of *bona fide* purchaſors, from the day of their enrolment, which is ordered to be marked on the record (5).

d See book I. c. 8.

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permitted to run away with the whole eſtate, and to leave nothing to the ſecond, who had fairly and honeſtly advanced his property. But this, if wrong, can only be corrected by the authority of the legiſlature.

(5) Theſe eſtates are ſometimes referred to in argument, but are now unknown in practice.

V. ANOTHER ſimilar conditional eſtate, created by operation of law, for ſecurity and ſatisfaction of debts, is called an [161] eſtate by *elegit*. What an *elegit* is, and why ſo called, will be explained in the third part of theſe commentaries. At preſent I need only mention, that it is the name of a writ, founded on the ſtatute [e] of Weſtm. 2. by which, after a plaintiff has obtained judgment for his debt at law, the ſheriff gives him poſſeſſion of one half of the defendant's lands and tenements, to be occupied and enjoyed, until his debt and damages are fully paid: and, during the time he ſo holds them, he is called tenant by *elegit*. It is eaſy to obſerve, that this is alſo a mere conditional eſtate, defeaſible as ſoon as the debt is levied. But it is remarkable, that the feodal reſtraints of alienating lands, and charging them with the debts of the owner, were ſoftened much earlier and much more effectually for the benefit of trade and commerce, than for any other conſideration. Before the ſtatute of *quia emptores* [f], it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the ſtatute therefore of Weſtm. 2. permits only ſo much of them to be affected by the proceſs of law, as a man was capable of alienating by his own deed. But by the ſtatute *de mercatoribus* (paſſed in the ſame year [g]) the whole of a man's lands was liable to be pledged in a ſtatute merchant, for a debt contracted in trade; though only *half* of them was liable to be taken in execution for any other debt of the owner.

I SHALL conclude what I had to remark of theſe eſtates, by ſtatute merchant, ſtatute ſtaple, and *elegit*, with the obſervation of ſir Edward Coke [h], "Theſe tenants have uncertain intereſts in lands and tenements, and yet they have "but chattels and no freeholds;" (which makes them an exception to the general rule) "becauſe though they may "hold an eſtate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it ſhall go to their "executors: for *ut* is ſimilitudinary; and though, to recover "their eſtates, they ſhall have the ſame remedy (by aſſiſe) as

[e] 13 Edw. I. c. 18.
[f] 18 Edw. I.
[g] 13 Edw. I.
[h] 1 Inſt 42, 43.

"a tenant

"a tenant of the freehold ſhall have [i], yet it is but the ſimili-"tude of a freehold, and *nullum ſimile eſt idem.*" This indeed only proves them to be chattel intereſts, becauſe they go to the executors, which is inconſiſtent with the nature of a freehold: but it does not aſſign the reaſon why theſe eſtates, in contradiſtinction to other uncertain intereſts, ſhall veſt in the executors of the tenant and not the heir; which is probably owing to this: that, being a ſecurity and remedy provided for perſonal debts due to the deceaſed, to which debts the executor is entitled, the law has therefore thus directed their ſucceſſion; as judging it reaſonable, from a principle of natural equity, that the ſecurity and remedy ſhould be veſted in thoſe to whom the debts if recovered would belong. For, upon the ſame principle, if lands be deviſed to a man's executor, until out of their profits the debts due from the teſtator be diſcharged, this intereſt in the lands ſhall be a chattel intereſt, and on the death of ſuch executor ſhall go to *his* executors [k]: becauſe they, being liable to pay the original teſtator's debts, ſo far as his aſſets will extend, are in reaſon entitled to poſſeſs that fund, out of which he has directed them to be paid.

i The words of the ſtatute *de mercatoribus* are, "*puiſſe porter bref de novele diſſeiſine, auxi ſicum de franktenement.*"

k Co. Litt. 42.

CHAPTER THE ELEVENTH.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

HITHERTO we have confidered eftates folely with regard to their duration, or the *quantity of intereft* which the owners have therein. We are now to confider them in another view; with regard to the *time of their enjoyment*, when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arifing therefrom) begins. Eftates therefore, with refpect to this confideration, may either be in *poffeffion*, or in *expectancy*: and of expectancies there are two forts; one created by the act of the parties, called a *remainder*; the other by act of law, and called a *reverfion*.

I. OF eftates in *poffeffion*, (which are fometimes called eftates *executed*, whereby a prefent intereft paffes to and refides in the tenant, not depending on any fubfequent circumftance or contingency, as in the cafe of eftates *executory*) there is little or nothing peculiar to be obferved. All the eftates we have hitherto fpoken of are of this kind; for, in laying down general rules, we ufually apply them to fuch eftates as are then actually in the tenant's poffeffion. But the doctrine of eftates in expectancy contains fome of the niceft and moft abftrufe learning in the Englifh law. Thefe will therefore require a minute difcuffion, and demand fome degree of attention.

II. AN

II. AN eſtate then in remainder may be defined to be, an eſtate limited to take effect and be enjoyed after another eſtate is determined. As if a man ſeiſed in fee-ſimple granteth lands to A for twenty years, and, after the determination of the ſaid term, then to B and his heirs for ever: here A is tenant for years, remainder to B in fee. In the firſt place an eſtate for years is created or carved out of the fee, and given to A; and the reſidue or remainder of it is given to B. But both theſe intereſts are in fact only one eſtate; the preſent term of years and the remainder afterwards, when added together, being equal only to one eſtate in fee[a]. They are indeed different *parts*, but they conſtitute only one *whole*: they are carved out of one and the ſame inheritance: they are both created, and may both ſubſiſt, together; the one in poſſeſſion, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the ſaid term to B for life; and after the determination of B's eſtate for life, it be limited to C and his heirs for ever: this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the eſtate of inheritance undergoes a diviſion into three portions: there is firſt A's eſtate for years carved out of it; and after that B's eſtate for life; and then the whole that remains is limited to C and his heirs. And here alſo the firſt eſtate, and both the remainders, for life and in fee, are one eſtate only; being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders, it would ſtill be the ſame thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence alſo it is eaſy to collect, that no remainder can be limited after the grant of an eſtate in fee-ſimple[b]: becauſe a fee-ſimple is the higheſt and largeſt eſtate, that a ſubject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the eſtate: a remainder therefore, which is only a portion, or reſiduary *part*, of the eſtate, cannot be reſerved after the whole is diſpoſed of. A particular eſtate, with all

[a] Co. Litt. 143.

[b] Plowd. 29. Vaugh. 269.

the remainders expectant thereon, is only one fee-ſimple; as 40*l.* is part of 100*l.* and 60*l.* is the remainder of it: wherefore, after a fee-ſimple once veſted, there can no more be a remainder limited thereon, than after the whole 100*l.* is appropriated there can be any reſidue ſubſiſting.

THUS much being premiſed, we ſhall be the better enabled to comprehend the rules that are laid down by law to be obſerved in the creation of remainders, and the reaſons upon which thoſe rules are founded.

1. AND, firſt, there muſt neceſſarily be ſome particular eſtate, precedent to the eſtate in remainder [c]. As, an eſtate for years to A, remainder to B for life; or, an eſtate for life to A, remainder to B in tail. This precedent eſtate is called the *particular* eſtate, as being only a ſmall part, or *particula*, of the inheritance; the reſidue or remainder of which is granted over to another. The neceſſity of creating this preceding particular eſtate, in order to make a good remainder, ariſes from this plain reaſon; that *remainder* is a relative expreſſion, and implies that ſome part of the thing is previouſly diſpoſed of: for where the whole is conveyed at once, there cannot poſſibly exiſt a remainder; but the intereſt granted, whatever it be, will be an eſtate in poſſeſſion.

AN eſtate created to commence at a diſtant period of time, without any intervening eſtate, is therefore properly no remainder: it is the whole of the gift, and not a reſiduary part. And ſuch future eſtates can only be made of chattel intereſts, which were conſidered in the light of mere contracts by the antient law [d], to be executed either now or hereafter, as the contracting parties ſhould agree: but an eſtate of freehold muſt be created to commence immediately. For it is an antient rule of the common law, that an eſtate of freehold cannot be created to commence *in futuro*; but it ought to take effect preſently either in poſſeſſion or remainder [e]: becauſe at com-

c Co. Litt. 49. Plowd. 25.
d Raym. 151.
e 5 Rep. 94.

mon

mon law no freehold in lands could paſs without livery of ſeiſin; which muſt operate either immediately, or not at all. It would therefore be contradictory, if an eſtate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate poſſeſſion. Therefore, though a leaſe to A for ſeven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs for ever from the end of three years next enſuing, is void. So that when it is intended to grant an eſtate of freehold, whereof the enjoyment ſhall be deferred till a future time, it is neceſſary to create a previous particular eſtate, which may ſubſiſt till that period of time is completed; and for the grantor to deliver immediate poſſeſſion of the land to the tenant of this particular eſtate, which is conſtrued to be giving poſſeſſion to him in remainder, ſince his eſtate and that of the particular tenant are one and the ſame eſtate in law. As, where one leaſes to A for three years, with remainder to B in fee, and makes livery of ſeiſin to A; here by the livery the freehold is immediately created, and veſted in B, during the continuance of A's term of years. The whole eſtate paſſes at once from the grantor to the grantees, and the remainder-man is ſeiſed of his remainder at the ſame time that the termor is poſſeſſed of his term. The enjoyment of it muſt indeed be deferred till hereafter; but it is to all intents and purpoſes an eſtate commencing *in praeſenti*, though to be occupied and enjoyed *in futuro*.

As no remainder can be created without ſuch a precedent particular eſtate, therefore the particular eſtate is ſaid to *ſupport* the remainder. But a leaſe at will is not held to be ſuch a particular eſtate, as will ſupport a remainder over [f]. For an eſtate at will is of a nature ſo ſlender and precarious, that it is not looked upon as a portion of the inheritance; and a portion muſt firſt be taken out of it, in order to conſtitute a remainder. Beſides, if it be a freehold remainder, livery of ſeiſin muſt be given at the time of it's creation; and the entry of the grantor, to do this, determines the eſtate at will

[f] 8 Rep. 75.

in the very inſtant in which it is made [g]: or, if the remainder be a chattel intereſt, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder:* for it is a ſeparate independent contract, diſtinct from the precedent eſtate at will; and every remainder muſt be part of one and the ſame eſtate, out of which the preceding particular eſtate is taken [h]. And hence it is generally true, that if the particular eſtate is void in it's creation, or by any means is defeated afterwards, the remainder ſupported thereby ſhall be defeated alſo [i]: as where the particular eſtate is an eſtate for the life of a perſon not *in eſſe* [k]; or an eſtate for life upon condition, on breach of which condition the grantor enters and avoids the eſtate [l]; in either of theſe caſes the remainder over is void.

2. A SECOND rule to be obſerved is this; that the remainder muſt commence or paſs out of the grantor at the time of the creation of the particular eſtate [m]. As, where there is an eſtate to A for life, with remainder to B in fee: here B's remainder in fee paſſes from the grantor at the ſame time that ſeiſin is delivered to A of his life eſtate in poſſeſſion. And it is this, which induces the neceſſity at common law of livery of ſeiſin being made on the particular eſtate, whenever a *freehold* remainder is created. For, if it be limited even on an eſtate for years, it is neceſſary that the leſſee for years ſhould have livery of ſeiſin, in order to convey the freehold from and out of the grantor; otherwiſe the remainder is void [n]. Not that the livery is neceſſary to ſtrengthen the eſtate for years; but, as livery of the land is requiſite to convey the freehold, and yet cannot be given to him in remainder without infringing the poſſeſſion of the leſſee for years, therefore the law allows ſuch livery, made to the tenant of the particular eſtate, to relate and inure to him in remainder, as both are but one eſtate in law [o].

g Dyer. 18.
h Raym. 151.
i Co. Litt. 298.
k 2 Roll. Abr. 415.
l 1 Jon. 58.
m Litt. § 671. Plowd. 25.
n Litt. § 60.
o Co. Litt. 49.

3. A

3. A THIRD rule refpecting remainders is this; that the remainder muft veft in the grantee during the continuance of the particular eftate, or *eo inftanti* that it determines [p]. As, if A be tenant for life, remainder to B in tail; here B's remainder is vefted in him, at the creation of the particular eftate to A for life: or, if A and B be tenants for their joint lives, remainder to the furvivor in fee; here, though during their joint lives the remainder is vefted in neither, yet on the death of either of them, the remainder vefts inftantly in the furvivor: wherefore both thefe are good remainders. But, if an eftate be limited to A for life, remainder to the eldeft fon of B in tail, and A dies before B hath any fon; here the remainder will be void, for it did not veft in any one during the continuance, nor at the determination, of the particular eftate: and, even fuppofing that B fhould afterwards have a fon, he fhall not take by this remainder; for, as it did not veft at or before the end of the particular eftate, it never can veft at all, but is gone for ever [q]. And this depends upon the principle before laid down, that the precedent particular eftate, and the remainder, are one eftate in law; they muft therefore fubfift and be *in effe* at one and the fame inftant of time, either during the continuance of the firft eftate or at the very inftant when that determines, fo that no other eftate can poffibly come between them. For there can be no intervening eftate between the particular eftate, and the remainder fupported thereby [r]: the thing fupported muft fall to the ground, if once it's fupport be fevered from it.

It is upon thefe rules, but principally the laft, that the doctrine of *contingent* remainders depends. For remainders are either *vefted* or *contingent*. *Vefted* remainders (or remainders *executed*, whereby a prefent intereft paffes to the party, though to be enjoyed *in futuro*) are where the eftate is invariably fixed, to remain to a determinate perfon, after the par-

[p] Plowd. 25. 1 Rep. 66.
[q] 1 Rep. 138.
[r] 3 Rep. 21.

ticular eſtate is ſpent. As if A be tenant for twenty years, remainder to B in fee; here B's is a veſted remainder, which nothing can defeat, or ſet aſide.

CONTINGENT or *executory* remainders (whereby no preſent intereſt paſſes) are where the eſtate in remainder is limited to take effect, either to a dubious and uncertain *perſon*, or upon a dubious and uncertain *event*; ſo that the particular eſtate may chance to be determined, and the remainder never take effect [s].

FIRST, they may be limited to a dubious and uncertain *perſon*. As if A be tenant for life, with remainder to B's eldeſt ſon, (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a ſon or no: but the inſtant that a ſon is born, the remainder is no longer contingent, but veſted. Though, if A had died before the contingency happened, that is, before B's ſon was born, the remainder would have been abſolutely gone; for the particular eſtate was determined before the remainder could veſt. Nay, by the ſtrict rule of law, if A were tenant for life, remainder to his own eldeſt ſon in tail, and A died without iſſue born, but leaving his wife *enſeint* or big with child, and after his death a poſthumous ſon was born, this ſon could not take the land, by virtue of this remainder; for the particular eſtate determined before there was any perſon *in eſſe*, in whom the remainder could veſt [t]. But, to remedy this hardſhip, it is enacted by ſtatute 10 & 11 W. III. c. 16. that poſthumous children ſhall be capable of taking in remainder, in the ſame manner as if they had been born in their father's lifetime: that is, the remainder is allowed to veſt in them, while yet in their mother's womb [u] (1).

[s] 3 Rep. 20. [t] Salk. 228. 4 Mod. 282. [u] See Vol. I. pag. 130.

(1) A father had deviſed an eſtate to his ſon for life, with a remainder to the firſt and other ſons of the ſon in tail; the ſon died, leaving his wife pregnant, who was afterwards delivered of a ſon: the courts of common pleas and king's bench held clearly, that

THIS species of contingent remainders, to a person not in being, must however be limited to some one, that may by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines [w]. As if an estate be made to A for life, remainder to the heirs of B; now, if A [170] dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est haeres viventis*: but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law [x]. But a remainder to the right heirs of B (if there be no such person as B *in esse*) is void [y]. For here there must two contingencies happen: first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good; for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possi-

w 2 Rep. 51. x Co. Litt. 378. y Hob. 33.

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the grandson not being born at the expiration of the estate for life, was not entitled to take it; but the lords, moved by the hardship of the case, reversed the judgments of the courts below, contrary to the opinions of all the judges. Reeve *v.* Long, 1 *Salk.* 227. But the house of commons in reproof of this assumption of legislative authority in the lords, immediately brought in the 10 & 11 W. III. which passed into a statute. The statute only mentions *marriage and other settlements*; and it is probable, that devises were designedly omitted to be expressed from delicacy, and that the authority of the judgments of the peers might not be too openly impeached. As the statute says the posthumous son in this case shall take the estate as if born before the death of the father, he is entitled to the intermediate profits from the death of the father, (3 *Atk.* 203.) which is different from the case of a descent devested by the birth of a posthumous child. See 1 Vol. p. 130. note 9.

 bility

bility that he should not only have a son, but a son of a particular name [z]. A limitation of a remainder to a bastard before it is born, is not good [a]: for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

A REMAINDER may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee: here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is for ever gone; but if A dies first, the remainder to B becomes vested.

[171] CONTINGENT remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate, less than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void [d]: but if granted to A for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest no where: unless therefore the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

CONTINGENT remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested [e].

z 5 Rep. 51.
a Cro. Eliz. 509.
b 1 Rep. 130.
c *Ibid.* 66. 135.

Therefore

Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, ſurrender, or other methods, deſtroy and determine his own life-eſtate, before any of thoſe remainders veſt (2); the conſequence of which is that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldeſt ſon unborn in tail, and the tenant for life, before any ſon is born, ſurrenders his life-eſtate, he by that means defeats the remainder in tail to his ſon: for his ſon not being *in eſſe*, when the particular eſtate determined, the remainder could not then veſt; and, as it could not veſt then, by the rules before laid down, it never can veſt at all. In theſe caſes therefore it is neceſſary to have truſtees appointed to preſerve the contingent remainders; in whom there is veſted an eſtate in remainder for the life of the tenant for life, to commence when his eſtate determines. If therefore his eſtate for life determines otherwiſe than by his death, the eſtate of the truſtees, for the reſidue of his natural life, will then take effect, and become a particular eſtate in poſſeſſion, [172] ſufficient to ſupport the remainders depending in contingency. This method is ſaid to have been invented by ſir Orlando Bridgman, ſir Geoffrey Palmer, and other eminent council, who betook themſelves to conveyancing during the time of the civil wars; in order thereby to ſecure in family ſettlements a proviſion for the future children of an intended marriage, who before were uſually left at the mercy of the particular tenant for life [d]: and when, after the reſtoration, thoſe gentlemen came to fill the firſt offices of the law, they ſupported this invention within reaſonable and proper bounds, and introduced it into general uſe (3).

[d] See Moor. 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

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(2) But a conveyance of a greater eſtate than he has by bargain and ſale, or by leaſe and releaſe, is no forfeiture, and will not defeat a contingent remainder. 2 *Leo.* 60. 3 *Mod.* 151.

(3) We have ſeen before, in chapter vii. that, in a grant of a fee-ſimple to A, it is neceſſary to give it to A and his heirs; of a fee-tail, to A and the heirs of his body; and that a grant to A,

 without

THUS the ſtudent will obſerve how much nicety is required in creating and ſecuring a remainder; and I truſt he will

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without any additional words, gives him only an eſtate for life. Hence the word *heirs* in the firſt caſe, and the words *heirs of the body* in the ſecond, are ſaid to be words of limitation, becauſe they limit or deſcribe what intereſt A takes by the grant, *viz.* in one caſe, a fee-ſimple, in the other, a fee-tail: and the heirs in both inſtances take no intereſt any farther than as the anceſtor may permit the eſtate to deſcend to them. But if a remainder is granted, or eſtate deviſed to the heirs of A, where no eſtate of freehold is at the ſame time given to A, the heir of A cannot take by deſcent from A; but he takes by purchaſe, under the grant, in the ſame manner as if the eſtate had been given to him by his proper name. Here the word heirs is called a word of purchaſe. Having premiſed the diſtinction between words of limitation and words of purchaſe, I may obſerve, that the much-talked-of rule in Shelly's caſe, 1 *Co.* 104. is this, *viz,* "when the anceſtor, by "any gift or conveyance, takes an eſtate of freehold, and in the "ſame gift or conveyance an eſtate is limited, either mediately "or immediately, to his heirs in fee or in tail, that always in ſuch "caſes *the heirs* are words of limitation, and not words of pur-"chaſe:" and the remainder is ſaid to be *executed* in the anceſtor, where there is no intermediate eſtate; or *veſted,* when an eſtate for life or in tail intervenes.

As if an eſtate be given to A for life, and after his death, to the heirs of his body; this remainder is executed in A, or it unites with his eſtate for life; and the effect is the ſame as if the eſtate had at once been given to A and the heirs of his body; which expreſſion limits an eſtate tail to A, and the iſſue have no indefeaſible intereſt conveyed to them, but can only take by deſcent from A. So alſo if an eſtate be given to A for life, with remainder to B for life or in tail, remainder to the heirs, or the heirs of the body, of A—A takes an eſtate for life, in this caſe, with a veſted remainder in fee or in tail; and his heir under this grant can only take by deſcent at his death. *Fearne,* 21. But when the eſtate for life, and the remainder in tail or in fee unite and coaleſce, and *heirs* is a word of limitation, the two eſtates muſt be created by the ſame inſtrument, and muſt be either both legal, or both truſt eſtates. *Doug.* 490. 2 *T. R.* 444. The rule with regard to the execution or coalition of ſuch eſtates ſeems now to be the ſame in equitable

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in some measure see the general reasons, upon which this nicety is founded. It were endless to attempt to enter upon

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as in legal estates. 1 *Bro*. 206. And in all these cases where a person has an estate tail, or a vested remainder in tail, he can cut off the expectations or inheritance of his issue, by a fine, or a recovery. *Doug*. 323. In order therefore to secure a certain provision for children, the method was invented of granting the estate to the father for life, and, after his death, to his first and other sons in tail; for the words *son* or *daughter* were held to be words of purchase, and the remainder to them did not, like the remainder to *heirs*, unite with the prior estate of freehold. But if the son was unborn, the remainder was contingent, and might have been defeated by the alienation of the father by feoffment, fine, or recovery: to prevent this, it was necessary to interpose trustees, to whom the estate is given upon such a determination of the life-estate, and in whom it rests, till the contingent estate, if at all, comes into existence; and thus they are said to support and preserve the contingent remainders. This is called a *strict settlement*, and is the only mode (executory devises excepted) by which a certain and indefeasible provision can be secured to an unborn child. But in the case of articles or covenants before marriage, for making a settlement upon the husband and wife, and their offspring, if there be a limitation to the parents for life, with a remainder to the heirs of their bodies, the latter words are generally considered as words of purchase, and not of limitation; and a court of equity will decree the articles to be executed in strict settlement. See *Fearne*, 124, and examples there cited. It being the great object of such settlements to secure fortunes for the issue of the marriage, it would be useless to give the parents an estate tail, of which they would almost immediately have the absolute disposal. And therefore the courts of equity will decree the estate to be settled upon the parent or parents for life; and upon the determination of that estate by forfeiture, to trustees to support contingent remainders for their lives; and after their decease, to the first and other sons successively in tail, with remainder to all the daughters in tail as tenants in common, with subsequent remainders or provisions according to the occasions and intentions of the parties. In these strict settlements, the estate is unalienable till the first son attains the age of 21, who, if his father is dead, has then, as tenant in tail, full power over the estate; or if his father is living,

the particular ſubtilties and refinements, into which this doctrine, by the variety of caſes which have occurred in the courſe of many centuries, has been ſpun out and ſubdivided: neither are they conſonant to the deſign of theſe elementary diſquiſitions. I muſt not however omit, that in deviſes by laſt will and teſtament, (which, being often drawn up when the party is *inops conſilii*, are always more favoured in conſtruction than formal deeds, which are preſumed to be made with great caution, fore-thought, and advice) in theſe deviſes, I ſay, remainders may be created in ſome meaſure contrary to the rules before laid down: though our lawyers will not

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he then can bar his own iſſue by a fine, independent of the father. *Cruiſe*, 161. But the father, and the ſon at that age, can cut off all the ſubſequent limitations, and diſpoſe of the eſtate in any manner they pleaſe by joining in a common recovery. This is the origin of the vulgar error, that a tenant of an eſtate-tail muſt have the conſent of his eldeſt ſon to enable him to cut off the intail; for that is neceſſary where the father has only a life-eſtate, and his eldeſt ſon has the remainder in tail. But there is no method whatever of ſecuring an eſtate to the grandchildren of a perſon, who is without children at the time of the ſettlement; for the law will not permit a perpetuity; and lord Thurlow has defined a perpetuity to be "any extenſion of an eſtate beyond a life in being, "and 21 years after." 2 *Bro.* 30. See n. 4. Hence, where in a ſettlement the father has a power to appoint an eſtate to or amongſt his children, he cannot afterwards give this to his children in ſtrict ſettlement, or give any of his ſons an eſtate for life, with a remainder in tail to his eldeſt ſon; for if he could do this, a perpetuity would be created by the original ſettlement. 2 *T. R.* 241.

The ſtudent, who wiſhes to obtain a clear and comprehenſive knowledge of this abſtruſe branch of legal learning, cannot beſtow too great attention upon Mr. Fearne's treatiſe upon Contingent Remainders and Executory Deviſes, where it is learnedly and perſpicuouſly diſcuſſed and methodized. I have thought it proper to ſelect and to ſubjoin here theſe important, though common, diſtinctions, as in innumerable inſtances, from the ignorance of the perſons employed, family ſettlements, particularly in wills, have proved abortive, and the intentions of parents and teſtators have been unhappily diſappointed.

allow ſuch diſpoſitions to be ſtrictly remainders; but call them by another name, that of *executory deviſes*, or deviſes hereafter to be executed.

AN executory deviſe of lands is ſuch a diſpoſition of them by will, that thereby no eſtate veſts at the death of the deviſor, but only on ſome future contingency. It differs from a remainder in three very material points: 1. That it needs not any particular eſtate to ſupport it. 2. That by it a fee-ſimple or other leſs eſtate, may be limited after a fee-ſimple. [173]
3. That by this means a remainder may be limited of a chattel intereſt, after a particular eſtate for life created in the ſame.

1. THE firſt caſe happens when a man deviſes a future eſtate to ariſe upon a contingency; and, till that contingency happens, does not diſpoſe of the fee-ſimple, but leaves it to deſcend to his heir at law. As if one deviſes land to a feme-ſole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular eſtate to ſupport it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory deviſe [e]. For, ſince by a deviſe a freehold may paſs without corporal tradition or livery of ſeiſin, (as it muſt do, if it paſſes at all) therefore it may commence *in futuro*; becauſe the principal reaſon why it cannot commence *in futuro* in other caſes, is the neceſſity of actual ſeiſin, which always operates *in praeſenti*. And, ſince it may thus commence *in futuro*, there is no need of a particular eſtate to ſupport it; the only uſe of which is to make the remainder, by it's unity with the particular eſtate, a preſent intereſt. And hence alſo it follows, that ſuch an executory deviſe, not being a preſent intereſt, cannot be barred by a recovery, ſuffered before it commences [f].

2. BY executory deviſe a fee, or other leſs eſtate, may be limited after a fee. And this happens where a deviſor deviſes his whole eſtate in fee, but limits a remainder thereon to

e 1 Sid. 153. f Cro. Jac. 593.

commence

commence on a future contingency. As if a man devifes land to A and his heirs; but, if he dies before the age of twenty-one, then to B and his heirs: this remainder, though void in a deed, is good by way of executory devife [g]. But, in both thefe fpecies of executory devifes, the contingencies ought to be fuch as may happen within a reafonable time; as within one or more life or lives in being, or within a mode-
[174] rate term of years; for courts of juftice will not indulge even wills, fo as to create a perpetuity, which the law abhors [h]: becaufe by perpetuities, (or the fettlement of an intereft, which fhall go in the fucceffion prefcribed, without any power of alienation [i]) eftates are made incapable of anfwering thofe ends, of focial commerce, and providing for the fudden contingencies of private life, for which property was at firft eftablifhed. The utmoft length that has been hitherto allowed for the contingency of an executory devife of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devifed to fuch unborn fon of a feme-covert, as fhall firft attain the age of twenty-one and his heirs; the utmoft length of time that can happen before the eftate can veft, is the life of the mother and the fubfequent infancy of her fon: and this hath been decreed to be a good executory devife [k] (4).

3. BY executory devife a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed: for by law the firft grant of it, to a man for life, was a total difpofition of the whole term; a life eftate being efteemed of a higher and larger nature than any term of years [l]. And, at firft, the

g 2 Mod. 289.
h 12 Mod. 287. 1 Vern. 164.
i Salk. 229.
k Fort. 232.
l 8 Rep. 95.

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(4) This limit was taken from the time in which an eftate may be rendered unalienable by a ftrict fettlement. An executory devife to an unborn fon of a man may be fufpended a few months beyond the life of the father, and twenty-one years afterwards by a pofthumous birth.

courts

courts were tender, even in the caſe of a will, of reſtraining the deviſee for life from aliening the term; but only held, that in caſe he died without exerting that act of ownerſhip, the remainder over ſhould then take place [m]: for the reſtraint of the power of alienation, eſpecially in very long terms, was introducing a ſpecies of perpetuity. But, ſoon afterwards, it was held [n], that the deviſee for life hath no power of aliening the term, ſo as to bar the remainder-man: yet, in order to prevent the danger of perpetuities, it was ſettled [o], that though ſuch remainders may be limited to as many perſons ſucceſſively as the deviſor thinks proper, yet they muſt all be *in eſſe* during the life of the firſt deviſee; for then all the [175 candles are lighted and are conſuming together, and the ultimate remainder is in reality only to that remainder-man who happens to ſurvive the reſt: and it was alſo ſettled, that ſuch remainder may not be limited to take effect, unleſs upon ſuch contingency as muſt happen (if at all) during the life of the firſt deviſee [p] (5).

THUS much for ſuch eſtates in expectancy, as are created by the expreſs words of the parties themſelves; the moſt intricate title in the law. There is yet another ſpecies, which

m Bro. *tit. chatteles*. 23. Dyer. 74.
n Dyer. 358. 8 Rep. 96.
o 1 Sid. 451.
p Skin. 341. 3 P. Wms. 258.

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(5) It has long been fully ſettled that a term for years, or any chattel intereſt, may be given by an executory deviſe to an unborn child of a perſon in exiſtence, when it attains the age of twenty-one; and that the limits of executory deviſes of real and perſonal property are preciſely the ſame. *Fearne*, 320. It is very common to bequeath chattel intereſts to A and his iſſue, and if he dies without iſſue, to B. It ſeems now to be determined, that where the words are ſuch as would have given A an eſtate-tail in real property, in perſonal property the ſubſequent limitations are void, and A has the abſolute intereſt: but if it appears from any clauſe or circumſtance in the will, that the teſtator intended to give it over only in caſe A had no iſſue living at the time of his death, upon that event the ſubſequent limitation will be good as an executory deviſe. See *Fearne*, 371. and caſes referred to in 3 *Cox's P. Wms*. 262.

is created by the act and operation of the law itſelf, and this is called a reverſion.

III. AN eſtate in *reverſion* is the reſidue of an eſtate left in the grantor, to commence in poſſeſſion after the determination of ſome particular eſtate granted out by him [q]. Sir Edward Coke [r] deſcribes a reverſion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reverſion of the fee is, without any ſpecial reſervation, veſted in the donor by act of law: and ſo alſo the reverſion, after an eſtate for life, years, or at will, continues in the leſſor. For the fee-ſimple of all lands muſt abide ſomewhere; and if he, who was before poſſeſſed of the whole, carves out of it any ſmaller eſtate, and grants it away, whatever is not ſo granted remains in him. A reverſion is never therefore created by deed or writing, but ariſes from conſtruction of law; a remainder can never be limited, unleſs by either deed or deviſe. But both are equally transferrable, when actually veſted, being both eſtates *in praeſenti*, though taking effect *in futuro*.

THE doctrine of reverſions is plainly derived from the feodal conſtitution. For, when a feud was granted to a man for life, or to him and his iſſue male, rendering either rent, or other ſervices; then, on his death or the failure of iſſue male, the feud was determined and reſulted back to the
[176] lord or proprietor, to be again diſpoſed of at his pleaſure. And hence the uſual *incidents* to reverſions are ſaid to be *fealty* and *rent*. When no rent is reſerved on the particular eſtate, fealty however reſults of courſe, as an incident quite inſeparable, and may be demanded as a badge of tenure, or acknowlegement of ſuperiority; being frequently the only evidence that the lands are holden at all. Where rent is reſerved, it is alſo incident; though not inſeparably ſo, to the reverſion [s]. The rent may be granted away, reſerving the reverſion; and the reverſion may be granted away, reſerving

[q] Co. Litt. 22.
[r] 1 Inſt. 142.
[s] Co. Litt. 143.

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the rent; by *ſpecial* words: but by a *general* grant of the reverſion, the rent will paſs with it, as incident thereunto; though by the grant of the rent generally, the reverſion will not paſs. The incident paſſes by the grant of the principal, but not *e converſo*: for the maxim of law is, "*acceſſorium non "ducit, ſed ſequitur, ſuum principale*[t]."

THESE *incidental* rights of the reverſioner, and the reſpective modes of deſcent, in which remainders very frequently differ from reverſions, have occaſioned the law to be careful in diſtinguiſhing the one from the other, however inaccurately the parties themſelves may deſcribe them. For if one, ſeiſed of a paternal eſtate in fee, makes a leaſe for life, with remainder to himſelf and his heirs, this is properly a mere reverſion[u], to which rent and fealty ſhall be incident; and which ſhall only deſcend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third perſon would have done[w]: for it is the old eſtate, which was originally in him, and never yet was out of him. And ſo likewiſe, if a man grants a leaſe for life to A, reſerving rent, with reverſion to B and his heirs, B hath a remainder deſcendible to his heirs general, and not a reverſion to which the rent is incident; but the grantor ſhall be entitled to the rent, during the continuance of A's eſtate[x].

IN order to aſſiſt ſuch perſons as have any eſtate in remainder, reverſion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the ſtatute 6 Ann. c. 18. that all perſons on whoſe lives any lands or tenements are holden, ſhall (upon application to the court of chancery and order made thereupon) once in every year, if required, be produced to the court, or it's commiſſioners; or, upon neglect or refuſal, they ſhall be taken to be actually dead, and the perſon entitled to ſuch [177

t Co. Litt. 151, 152.
u Cro. Eliz. 321.
w 3 Lev. 407.
x 1 And. 23.

expectant

expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

BEFORE we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate [y], the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en auter droit*) there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife [z]. An estate-tail is an exception to this rule: for a man may have in his own right both an estate tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee [a]. For estates-tail are protected and preserved from merger by the
[178] operation and construction, though not by the express words, of the statute *de donis*: which operation and construction have probably arisen upon this consideration; that, in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of

[y] 3 Lev. 437.
[z] Plow. 418. Cro. Jac. 275. Co. Litt. 338.
[a] 2 Rep. 61. 8 Rep. 74.

the

the inferior eſtate [b]. But, in an eſtate-tail, the caſe is otherwiſe: the tenant for a long time had no power at all over it, ſo as to bar or to deſtroy it, and now can only do it by certain ſpecial modes, by a fine, a recovery, and the like [c]: it would therefore have been ſtrangely improvident, to have permitted the tenant in tail, by purchaſing the reverſion in fee, to merge his particular eſtate, and defeat the inheritance of his iſſue: and hence it has become a maxim, that a tenancy in tail, which cannot be ſurrendered, cannot alſo be merged in the fee.

[b] Cro. Eliz. 302.

[c] See pag. 116.

CHAPTER THE TWELFTH.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

WE come now to treat of eſtates, with reſpect to the number and connexions of their owners, the tenants who occupy and hold them. And, conſidered in this view, eſtates of any quantity or length of duration, and whether they be in actual poſſeſſion or expectancy, may be held in four different ways; in ſeveralty, in joint-tenancy, in coparcenary, and in common.

I. He that holds lands or tenements in *ſeveralty*, or is ſole tenant thereof, is he that holds them in his own right only, without any other perſon being joined or connected with him in point of intereſt, during his eſtate therein. This is the moſt common and uſual way of holding an eſtate; and therefore we may make the ſame obſervations here, that we did upon eſtates in poſſeſſion, as contradiſtinguiſhed from thoſe in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, ſince all eſtates are ſuppoſed to be of this ſort, unleſs where they are expreſsly declared to be otherwiſe; and that in laying down general rules and doctrines, we uſually apply them to ſuch eſtates as are held in ſeveralty. I ſhall therefore proceed to conſider the other three ſpecies of eſtates, in which there are always a plurality of tenants.

II. An eſtate in *joint-tenancy* is where lands or tenements are granted to two or more perſons, to hold in fee-ſimple, fee-tail, for life, for years, or at will. In conſequence of ſuch

ſuch grants an eſtate is called an eſtate in joint-tenancy [a], and ſometimes an eſtate in *jointure*, which word as well as the other ſignifies an union or conjunction of intereſt; though in common ſpeech the term *jointure*, is now uſually confined to that joint eſtate, which by virtue of the ſtatute 27 Hen. VIII. c. 10. is frequently veſted in the huſband and wife before marriage, as a full ſatisfaction and bar of the woman's dower [b].

IN unfolding this title, and the two remaining ones in the preſent chapter, we will firſt inquire, how theſe eſtates may be *created*; next, their *properties* and reſpective *incidents*; and laſtly, how they may be *ſevered* or *deſtroyed*.

1. THE *creation* of an eſtate in joint-tenancy depends on the wording of the deed or deviſe, by which the tenants claim title; for this eſtate can only ariſe by purchaſe or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an eſtate be given to a plurality of perſons, without adding any reſtrictive, excluſive, or explanatory words, as if an eſtate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant ſo as to make all parts of it take effect, which can only be done by creating an equal eſtate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other reſpects. For,

2. THE *properties* of a joint eſtate are derived from it's unity, which is fourfold; the unity of *intereſt*, the unity of *title*, the unity of *time*, and the unity of *poſſeſſion*: or, in other words, joint-tenants have one and the ſame intereſt, accruing by one and the ſame conveyance, commencing at one and the ſame time, and held by one and the ſame undivided poſſeſſion.

FIRST, they muſt have one and the ſame *intereſt*. One joint-tenant cannot be entitled to one period of duration or quantity of intereſt in lands, and the other to a different; [181]

[a] Litt. § 277.

[b] See pag. 137.

one cannot be tenant for life, and the other for years: one cannot be tenant in fee, and the other in tail [c]. But, if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the inheritance [d]. If land be granted to A and B for their lives, and to the heirs of A; here A and B are joint-tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty: or, if land be given to A and B, and the heirs of the body of A; here both have a joint estate for life, and A hath a several remainder in tail [e]. Secondly, joint-tenants must also have an unity of *title*: their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin [f]. Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of *time*: their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another [g]. Yet, where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their
[182] lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though

c Co. Litt. 188.
d Litt. § 277.
e *Ibid.* § 285.
f *Ibid.* § 278.
g Co. Litt. 188.

vested

vested at different times[g]: because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in joint-tenancy, there must be an unity of *possession*. Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all*: that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*[h]. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety[i]. And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor[k] (1).

UPON these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion[l]. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate[m]. On the same reason, livery of seisin, made

g Dyer. 340. 1 Rep. 101.

h Litt. § 288. 5 Rep. 10.

i *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.* Bract. *l.* 5. *tr.* 5. *c.* 26.

k Litt. § 665. Co. Litt. 187. Pro. *Abr. t. cui in vita.* 8. 2 Vern. 120. 2 Lev. 39.

l Co. Litt. 214.

m *Ibid.* 192.

(1) And if a grant is made of a joint estate to husband and wife, and a third person, the husband and wife shall have one moiety, and the third person the other moiety, in the same manner as if it had been granted only to two persons. So if the grant is to husband and wife and two others, the husband and wife take one third in joint-tenancy. *Litt.* § 291.

to one joint-tenant, ſhall enure to both of them [n]: and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both [o]. In all actions alſo relating to their joint eſtate, one joint-tenant cannot ſue or be ſued without joining the other [p]. But if two or more joint-tenants be ſeiſed of an advowſon, and they preſent different clerks, the biſhop may refuſe to admit either: becauſe neither joint-tenant hath a ſeveral right of patronage, but each is ſeiſed of
[183] the whole: and, if they do not both agree within ſix months, the right of preſentation ſhall lapſe. But the ordinary may, if he pleaſes, admit a clerk preſented by either, for the good of the church, that divine ſervice may be regularly performed; which is no more than he otherwiſe would be entitled to do, in caſe their diſagreement continued, ſo as to incur a lapſe: and, if the clerk of one joint-tenant be ſo admitted, this ſhall keep up the title in both of them; in reſpect of the privity and union of their eſtate [q]. Upon the ſame ground it is held, that one joint-tenant cannot have an action againſt another for treſpaſs, in reſpect of his land [r]; for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himſelf to do any act, which may tend to defeat or injure the eſtate of the other; as to let leaſes, or to grant copyholds [s]: and, if any waſte be done, which tends to the deſtruction of the inheritance, one joint-tenant may have an action of waſte againſt the other, by conſtruction of the ſtatute Weſtm. 2. c. 22 [t]. So too, though at common law no action of account lay for one joint-tenant againſt another, unleſs he had conſtituted him his bailiff or receiver [u], yet now by the ſtatute 4 Ann. c. 16. joint-tenants may have actions of account againſt each other, for receiving more than their due ſhare of the profits of the tenements held in joint-tenancy (2).

n Co. Litt. 49.
o *Ibid.* 319. 364.
p *Ibid.* 195.
q *Ibid.* 185.
r 3 Leon. 262.
s 1 Leon. 234.
t 2 Inſt. 403.
u Co. Litt. 200.

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(2) This action is now perhaps never brought; but the practice is to apply to a court of equity to compel an account; which

is

FROM the ſame principle alſo ariſes the remaining grand incident of joint eſtates; *viz.* the doctrine of *ſurvivorſhip*: by which when two or more perſons are ſeiſed of a joint eſtate, of inheritance, for their own lives, or *per auter vie*, or are jointly poſſeſſed of any chattel intereſt, the entire tenancy upon the deceaſe of any of them remains to the ſurvivors, and at length to the laſt ſurvivor; and he ſhall be entitled to the whole eſtate, whatever it be, whether an inheritance or a common freehold only, or even a leſs eſtate [w]. This is the natural and regular conſequence of the union and entirety of their intereſt. The intereſt of two joint-tenants is not only equal or ſimilar, but alſo is one and the ſame. [184] One has not originally a diſtinct moiety from the other; but, if by any ſubſequent act (as by alienation or forfeiture of either) the intereſt becomes ſeparate and diſtinct, the joint-tenancy inſtantly ceaſes. But, while it continues, each of two joint-tenants has a concurrent intereſt in the whole; and therefore, on the death of his companion, the ſole intereſt in the whole remains to the ſurvivor. For the intereſt, which the ſurvivor originally had, is clearly not deveſted by the death of his companion; and no other perſon can now claim to have a *joint* eſtate with him, for no one can now have an intereſt in the whole, accruing by the ſame title, and taking effect at the ſame time with his own; neither can any one claim a *ſeparate* intereſt in any part of the tenements; for that would be to deprive the ſurvivor of the right which he has in all, and every part. As therefore the ſurvivor's original intereſt in the whole ſtill remains; and as no one can now be admitted, either jointly or ſeverally, to any ſhare with him therein; it follows, that his own intereſt muſt now be entire and ſeveral, and that he ſhall alone be entitled to the whole eſtate (whatever it be) that was created by the original grant.

[w] Litt. § 280, 281.

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is alſo the juriſdiction generally reſorted to, in order to obtain a partition between joint-tenants, parcenors, and tenants in common. *Com. Dig. Chanc.* 3 V. 6. & 4 *E. Miſc.* 109.

THIS right of ſurvivorſhip is called by our ancient authors [x] the *jus accreſcendi*, becauſe the right, upon the death of one joint-tenant, accumulates and increaſes to the ſurvivors; or, as they themſelves expreſs it, "*pars illa communis accreſcit ſuper-*" *ſtitibus, de perſona in perſonam, uſque ad ultimam ſuperſtitem.*" And this *jus accreſcendi* ought to be mutual; which I apprehend to be one reaſon why neither the king [y], nor any corporation [z], can be a joint-tenant with a private perſon. For here is no mutuality: the private perſon has not even the remoteſt chance of being ſeiſed of the entirety, by benefit of ſurvivorſhip; for the king and the corporation can never die (3).

[185] 3. WE are, laſtly, to inquire how an eſtate in joint-tenancy may be *ſevered* and *deſtroyed*. And this may be done by deſtroying any of it's conſtituent unities. 1. That of *time*, which reſpects only the original commencement of the joint-eſtate, cannot indeed, (being now paſt) be affected by any ſubſequent tranſactions. But, 2. The joint-tenants' eſtate may be deſtroyed, without any alienation, by merely diſuniting their *poſſeſſion*. For joint-tenants being ſeiſed *per my et per tout*, every thing that tends to narrow that intereſt, ſo that they ſhall not be ſeiſed throughout the whole, and

x Bracton. *l.* 4. *tr.* 3. c. 9. § 3. Fleta. *l.* 3. *c.* 4.

y Co. Litt. 190. Finch. L. 83.

z 2 Lev. 12.

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(3) But lord Coke ſays expreſsly, " there may be joint-tenants, " though there be not equal benefit of ſurvivorſhip; as if a man " let lands to A and B during the life of A; if B die, A ſhall " have all by ſurvivorſhip; but if A die, B ſhall have nothing." *Co. Litt.* 181. The mutuality of ſurvivorſhip does not therefore appear to be the reaſon why a corporation cannot be a joint-tenant with a private perſon; for two corporations cannot be joint-tenants together; but whenever a joint-eſtate is granted to them, they take as tenants in common. *Co. Litt.* 190. But there is no ſurvivorſhip of a capital, or a ſtock in trade, among merchants and traders; for this would be ruinous to the family of the deceaſed partner; and it is a legal maxim, *jus accreſcendi inter mercatores pro beneficio commercii locum non habet.* Co. Litt. 182. See p. 399. *poſt.*

throughout every part, is a ſeverance or deſtruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in ſeveralty, they are no longer joint-tenants; for they have now no joint-intereſt in the whole, but only a ſeveral intereſt reſpectively in the ſeveral parts. And for that reaſon alſo, the right of ſurvivorſhip is by ſuch ſeparation deſtroyed [a]. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other ſo to do [b]: for, this being an eſtate originally created by the act and agreement of the parties, the law would not permit any one or more of them to deſtroy the united poſſeſſion without a ſimilar univerſal conſent. But now by the ſtatutes 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. joint-tenants, either of inheritances or other leſs eſtates, are compellable by writ of partition to divide their lands [c]. 3. The jointure may be deſtroyed by deſtroying the unity of *title*. As if one joint-tenant alienes and conveys his eſtate to a third perſon: here the joint-tenancy is ſevered, and turned into tenancy in common [d]; for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the ſubſequent, grantor) though, till partition made, the unity of poſſeſſion continues. But a deviſe of one's ſhare by will [186] is no ſeverance of the jointure: for no teſtament takes effect till after the death of the teſtator, and by ſuch death the right of the ſurvivor (which accrued at the original creation of the eſtate, and has therefore a priority to the other [e]) is already veſted [f] (4). 4. It may alſo be deſtroyed, by deſtroying the unity

[a] Co. Litt. 188. 193.

[b] Litt. § 290.

[c] Thus, by the civil law, *nemo invitus compellitur ad communionem.* (*Ff.* 12. 6. 26. § 4.) And again; *ſi non omnes qui rem communem habent, ſed certi ex his, dividere deſiderant; hoc judicium inter eos accipi poteſt.* (*Ff.* 10. 3. 8.)

[d] Litt. § 292.

[e] *Jus accreſcendi praefertur ultimae voluntati.* Co. Litt. 185.

[f] Litt. § 287.

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(4) If a will is made by a joint-tenant of real property, deviſing his intereſt in the premiſes, and after the execution of the will there is a partition of the eſtate, the teſtator's ſhare cannot paſs by the deviſe unleſs there is a republication of the will ſubſequent to the partition. 3 *Burr.* 1488.

of *intereſt*. And therefore, if there be two joint-tenants for life, and the inheritance is purchaſed by or deſcends upon either, it is a ſeverance of the jointure [g]; though, if an eſtate is originally limited to two for life, and after to the heirs of one of them, the freehold ſhall remain in jointure, without merging in the inheritance; becauſe, being created by one and the ſame conveyance, they are not ſeparate eſtates, (which is requiſite in order to a merger) but branches of one entire eſtate [h]. In like manner, if a joint-tenant in fee makes a leaſe for life of his ſhare, this defeats the jointure [i]; for it deſtroys the unity both of title and of intereſt. And, whenever or by whatever means the jointure ceaſes or is ſevered, the right of ſurvivorſhip or *jus accreſcendi* the ſame inſtant ceaſes with it [k]. Yet, if one of three joint-tenants alienes his ſhare, the two remaining tenants ſtill hold their parts by joint-tenancy and ſurvivorſhip [l]: and, if one of three joint-tenants releaſes his ſhare to one of his companions, though the joint-tenancy is deſtroyed with regard to that part, yet the two remaining parts are ſtill held in jointure [m]; for they ſtill preſerve their original conſtituent unities. But when, by any act or event, different intereſts are created in the ſeveral parts of the eſtate, or they are held by different titles, or if merely the poſſeſſion is ſeparated; ſo that the tenants have no longer theſe four indiſpenſable properties, a ſameneſs of intereſt, and undivided poſſeſſion, a title veſting at one and the ſame time, and by one and the ſame act or grant; the jointure is inſtantly diſſolved.

[187] IN general it is advantageous for the joint-tenants to diſſolve the jointure; ſince thereby the right of ſurvivorſhip is taken away, and each may tranſmit his own part to his own heirs. Sometimes however it is diſadvantageous to diſſolve the joint eſtate: as if there be joint-tenants for life, and they make partition, this diſſolves the jointure; and, though be-

g Cro. Eliz. 470.

h 2 Rep. 60. Co. Litt. 182.

i Litt. § 302, 303.

k *Nihil de re accreſcit ei, qui nihil in re quando jus accreſceret habet.* Co. Litt. 188.

l Litt. § 294.

m *Ibid.* § 304

fore

fore they each of them had an eſtate in the whole for their own lives and the life of their companion, now they have an eſtate in a moiety only for their own lives merely; and, on the death of either, the reverſioner ſhall enter on his moiety [n]. And therefore, if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture [o]: for in the firſt place, by the ſeverance of the jointure he has given himſelf in his own moiety only an eſtate for his own life; and then he grants the ſame land for the life of another: which grant, by a tenant for his own life merely, is a forfeiture of his eſtate [p]; for it is creating an eſtate which may by poſſibility laſt longer than that which he is legally entitled to.

III. AN eſtate held in *coparcenary* is where lands of inheritance deſcend from the anceſtor to two or more perſons. It *ariſes* either by common law or particular cuſtom. By common law: as where a perſon ſeiſed in fee-ſimple or in fee-tail dies, and his next heirs are two or more females, his daughters, ſiſters, aunts, couſins, or their repreſentatives; in this caſe they ſhall all inherit, as will be more fully ſhewn, when we treat of deſcents hereafter: and theſe co-heirs are then called *coparceners;* or, for brevity, *parceners* only [q]. Parceners by particular cuſtom are where lands deſcend, as in gavelkind, to all the males in equal degree, as ſons, brothers, uncles, *&c* [r]. And, in either of theſe caſes, all the parceners put together make but one heir; and have but one eſtate among them [s].

THE *properties* of parceners are in ſome reſpects like thoſe of joint-tenants; they having the ſame unities of *intereſt*, *title*, and *poſſeſſion*. They may ſue and be ſued jointly for matters relating to their own lands [t]: and the entry of one of them ſhall in ſome caſes enure as the entry of them all [u]. [188]

n 1 Jones. 55.
o 4 Leon. 237.
p Co. Litt. 252.
q Litt. § 241, 242.
r Litt. § 265.
s Co. Litt. 163.
t *Ibid.* 164.
u *Ibid.* 188, 243.

They

They cannot have an action of trespass against each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste[w]; for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points: 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants[x]: and hence it likewise follows, that no lands can be held in copareenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners[y]; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have an *unity*, have not an *entirety*, of interest. They are properly entitled each to the whole of a distinct moiety[z]; and of course there is no *jus accrescendi*, or survivorship between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer [189] parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*[a] (5).

w 2 Inst. 403.
x Litt. § 254.
y Co. Litt. 164. 174.
z *Ibid.* 163, 164.
a Litt. § 309.

(5) And also all personal property. See page 399, *post*.

PARCENERS

PARCENERS are so called, saith Littleton [b], because they may be constrained to make *partition*. And he mentions many methods of making it [c]; four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to chuse some friend to make partition for them, and then the sisters shall chuse each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not chuse first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger [d] (6). And the reason given is, that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall chuse last; for the rule of law is, *cujus est divisio, alterius est electio*. The fourth method is where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion is, where one or more sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanneled, and assign to each of the parceners her part in severalty [e] (7). But there are some things

[b] § 241.

[c] § 243 to 264.

[d] Co. Litt. 166. 3 Rep. 22.

[e] By statute 8 & 9 W. III. c. 31. an easier

(6) It has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after her death. *Harg. Co. Litt.* 166. But it was expresly determined in favour of such a grantee in 1 *Ves.* 340.

(7) Another, and the most usual, mode of compulsion is by a decree of a court of equity. See page 183. n. 2. *ante*.

which are in their nature impartible. The manſion-houſe, common of eſtovers, common of piſcary uncertain, or any other common without ſtint, ſhall not be divided; but the eldeſt ſiſter, if ſhe pleaſes, ſhall have them, and make the others a reaſonable ſatisfaction in other parts of the inheritance: or, if that cannot be, then they ſhall have the profits of the thing by turns, in the ſame manner as they take the advowſon [f].

THERE is yet another conſideration attending the eſtate in coparcenary; that if one of the daughters has had an eſtate given with her in *frankmarriage* by her anceſtor, (which we may remember was a ſpecies of eſtates-tail, freely given by a relation for advancement of his kinſwoman in marriage [g]) in this caſe, if lands deſcend from the *ſame* anceſtor to her and her ſiſters in fee-ſimple, ſhe or her heirs ſhall have no ſhare of them, unleſs they will agree to divide the lands ſo given in frankmarriage in equal proportion with the reſt of the lands deſcending [h]. This mode of diviſion was known in the law of the Lombards [i]; which directs the woman ſo preferred in marriage, and claiming her ſhare of the inheritance, *mittere in confuſum cum ſororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum.* With us it is denominated bringing thoſe lands into *hotchpot* [k]: which term I ſhall explain in the very words of Littleton [l]: "it ſeemeth that this word, "*hotchpot*, is in Engliſh a pudding; for in a pudding is "not commonly put one thing alone, but one thing with "other things together." By this houſewifely metaphor our anceſtors meant to inform us [m], that the lands, both thoſe given in frankmarriage and thoſe deſcending in fee-ſimple, ſhould be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice

eaſier method of carrying on the proceedings on a writ of partition, of lands held either in joint-tenancy, parcenary, or common, than was uſed at the common law, is chalked out and provided.

f Co. Litt. 164, 165.

g See pag. 115.

h Bracton. *l.* 2. *c.* 34. Litt. § 266, to 273.

i *l.* 2. *t.* 14. *c.* 15.

k Britton. *c.* 72.

l § 267.

m Litt. § 268.

of the donee in frankmarriage: and if ſhe did not chuſe to put her lands into hotchpot, ſhe was preſumed to be ſufficiently provided for, and the reſt of the inheritance was divided [191] among her other ſiſters. The law of hotchpot took place then only, when the other lands deſcending from the anceſtor were fee-ſimple; for if they deſcended in tail, the donee in frankmarriage was entitled to her ſhare, without bringing her lands ſo given into hotchpot [n]. And the reaſon is, becauſe lands deſcending in fee-ſimple are diſtributed by the policy of law, for the maintenance of all the daughters; and, if one has a ſufficient proviſion out of the ſame inheritance, equal to the reſt, it is not reaſonable that ſhe ſhould have more: but lands, deſcending in tail, are not diſtributed by the operation of the law, but by the deſignation of the giver, *per formam doni;* it matters not therefore how unequal this diſtribution may be. Alſo no lands, but ſuch as are given in frankmarriage, ſhall be brought into hotchpot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage-portion [o]. And, therefore, as gifts in frankmarriage are fallen into diſuſe, I ſhould hardly have mentioned the law of hotchpot, had not this method of diviſion been revived and copied by the ſtatute for diſtribution of perſonal eſtates, which we ſhall hereafter conſider at large.

THE eſtate in coparcenary may be *diſſolved*, either by partition, which diſunites the poſſeſſion; by alienation of one parcener, which diſunites the title, and may diſunite the intereſt; or by the whole at laſt deſcending to and veſting in one ſingle perſon, which brings it to an eſtate in ſeveralty.

IV. TENANTS in *common* are ſuch as hold by ſeveral and diſtinct titles, but by unity of poſſeſſion; becauſe none knoweth his own ſeveralty, and therefore they all occupy promiſcuouſly [p]. This tenancy therefore happens, where there is a unity of poſſeſſion merely, but perhaps an entire

[n] Litt. § 274.
[o] *Ibid.* 275.
[p] *Ibid.* 292.

disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no
[*192] necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession: and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

TENANCY in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest: As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation[q]; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A in tail, and the other gives his to B in tail, the donees are tenants in common, as holding by different titles, and conveyances[r]. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common[s]; because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten[t]: and in this, and

q Litt. § 293.
r *Ibid.* 295.
s *Ibid.* 309.
t *Ibid.* § 283.

the like cafes, their iffues fhall be tenants in common; becaufe they muft claim by different titles, one as heir of A, and the other as heir of B; and thofe too not titles by purchafe, but defcent. In fhort, whenever an eftate in joint- [193] tenancy or coparcenary is diffolved, fo that there be no partition made, but the unity of poffeffion continues, it is turned into a tenancy in common.

A TENANCY in common may alfo be created by exprefs limitation in a deed: but here care muft be taken not to infert words which imply a joint eftate; and then if lands be given to two or more, and it be not joint-tenancy, it muft be a tenancy in common. But the law is apt in it's conftructions to favour joint-tenancy rather than tenancy in common[u]; becaufe the divifible fervices iffuing from land (as rent, &c.) are not divided, nor the entire fervices (as fealty) multiplied, by joint-tenancy, as they muft neceffarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an eftate in common[w]; and, if one grants to another *half* his land, the grantor and grantee are alfo tenants in common[x]: becaufe, as has been before[y] obferved, joint-tenants do not take by diftinct halves or moieties; and by fuch grants the divifion and feveralty of the eftate is fo plainly expreffed, that it is impoffible they fhould take a joint intereft in the whole of the tenements. But a *devife* to two perfons to hold *jointly and feverally*, is faid to be a joint-tenancy[z]; becaufe that is neceffarily implied in the word "jointly," the word "feverally" perhaps only implying the power of partition: and an eftate given to A and B, *equally to be divided* between them, though in *deeds* it hath been faid to be a joint-tenancy[a], (for it implies no more than the law has annexed to that eftate, *viz.* divifibility[b]) yet in *wills* it is certainly a tenancy in common[c]; becaufe the devifor may be prefumed to have meant what is moft beneficial to both

u Salk. 392.
w Litt. § 298.
x *Ibid.* 299.
y See p. 182.
z Poph. 52.
a 1 Equ. Caf. abr. 291.
b 1 P. Wms. 17.
c 3 Rep. 39. 1 Ventr. 32.

the

the deviſees, though his meaning is imperfectly expreſſed (8). And this nicety in the wording of grants makes it the moſt uſual as well as the ſafeſt way, when a tenancy in common is meant to be created, to add expreſs words of excluſion as [194] well as deſcription, and limit the eſtate to A and B, to hold *as tenants in common, and not as joint-tenants.*

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the ſtatutes of Henry VIII and William III, before-mentioned [d], to make partition of their lands; which they were not at common law. They properly take by diſtinct moieties, and have no entirety of intereſt; and therefore there is no ſurvivorſhip between tenants in common. Their other incidents

[d] pag. 185, & 189.

(8) In ancient times joint-tenancy was favoured by the courts of law, becauſe it was more convenient to the lord and more conſiſtent with feudal principles; but thoſe reaſons have long ceaſed, and a joint-tenancy is now every where regarded, as lord Cowper ſays it is in equity, as an odious thing. 1 *Salk.* 158. In wills the expreſſions *equally to be divided, ſhare and ſhare alike, reſpectively, between,* and *amongſt,* have been held to create a tenancy in common. 2 *Atk.* 121. 4 *Bro.* 15. 1 *Cox's P. Wms.* 14. I ſhould have little doubt but the ſame conſtruction would now be put upon the word *ſeverally*, which ſeems peculiarly to denote ſeparation or diviſion. But thoſe words are only evidence of intention, and will not create a tenancy in common, where the contrary from other parts of the will appears to be the manifeſt intention of the teſtator. 3 *Bro.* 215.

The words *equally to be divided* make a tenancy in common in ſurrenders of copyholds, and alſo in deeds, which derive their operation from the ſtatute of uſes. 1 *P. Wms.* 14. 1 *Wilſ.* 341. 2 *Veſ.* 257. And though lord Hardwicke ſeems to be of opinion in 1 *Veſ.* 165. 2 *Veſ.* 257. that theſe words are not ſufficient to create a tenancy in common in common law conveyances, yet I am inclined to think, that in ſuch a caſe, nothing but invincible authority would now induce the courts to adopt that opinion, and to decide in favour of a joint-tenancy.

incidents are ſuch as merely ariſe from the unity of poſſeſſion; and are therefore the ſame as appertain to joint-tenants merely upon that account: ſuch as being liable to reciprocal actions of waſte, and of account, by the ſtatutes of Weſtm. 2. c. 22. and 4 Ann c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the eſtate[e]; though, if one actually turns the other out of poſſeſſion, an action of ejectment will lie againſt him[f] (9). But, as for other incidents of joint-tenants, which ariſe from the privity of title, or the union and entirety of intereſt, (ſuch as joining or being joined in actions[g], unleſs in the caſe where ſome intire or indiviſible thing is to be recovered[h]) theſe are not applicable to tenants in common, whoſe intereſts are diſtinct, and whoſe titles are not joint but ſeveral.

ESTATES in common can only be *diſſolved* two ways: 1. By uniting all the titles and intereſts in one tenant, by purchaſe or otherwiſe; which brings the whole to one ſeveralty: 2. By making partition between the ſeveral tenants in common, which gives them all reſpective ſeveralties. For indeed tenancies in common differ in nothing from ſole eſtates but merely in the blending and unity of poſſeſſion. And this finiſhes our inquiries with reſpect to the nature of *eſtates*.

[e] Co. Litt. 199.
[f] *Ibid.* 200.
[g] Litt. § 311.
[h] Co. Litt. 197.

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(9) But adverſe poſſeſſion, or the uninterrupted receipt of the rents and profits, is now held to be evidence of an actual ouſter. And where one tenant in common has been in undiſturbed poſſeſſion for twenty years, in an ejectment brought againſt him by the co tenant, the jury will be directed to preſume an actual ouſter, and conſequently to find a verdict for the defendant. *Cowp.* 217.

CHAPTER THE THIRTEENTH.

OF THE TITLE TO THINGS REAL, IN GENERAL.

THE foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in diftinguifhing the feveral kinds of *eftate* or intereft that may be had therein; I come now to confider, laftly, the *title* to things real, with the manner of acquiring and lofing it.

A TITLE is thus defined by fir Edward Coke [a], *titulus eft jufta caufa poffidendi id quod noftrum eft;* or, it is the means whereby the owner of lands hath the juft poffeffion of his property.

THERE are feveral ftages or degrees requifite to form a complete title to lands and tenements. We will confider them in a progreffive order.

I. THE loweft and moft imperfect degree of title confifts in the mere *naked poffeffion*, or actual occupation of the eftate; without any apparent right, or any fhadow or pretence of right, to hold and continue fuch poffeffion. This may happen, when one man invades the poffeffion of another, and by force or furprize turns him out of the occupation of his lands; which is termed a *diffeifin*, being a deprivation of that actual feifin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the anceftor and before the entry of the heir, or

[a] 1 Inft. 345.

after

after the death of a particular tenant and before the entry of him in remainder or reverſion, a ſtranger may contrive to get poſſeſſion of the vacant land, and hold out him that had a right to enter. In all which caſes, and many others that might be here ſuggeſted, the wrongdoer has only a mere naked poſſeſſion, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of theſe commentaries. But in the mean time, till ſome act be done by the rightful owner to deveſt this poſſeſſion and aſſert his title, ſuch actual poſſeſſion is, *prima facie*, evidence of a legal title in the poſſeſſor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeaſible title. And, at all events, without ſuch actual poſſeſſion no title can be completely good.

II. THE next ſtep to a good and perfect title is the *right of poſſeſſion*, which may reſide in one man, while the actual poſſeſſion is not in himſelf but in another. For if a man be diſſeiſed, or otherwiſe kept out of poſſeſſion, by any of the means before-mentioned, though the *actual* poſſeſſion be loſt, yet he has ſtill remaining in him the *right* of poſſeſſion; and may exert it whenever he thinks proper, by entering upon the diſſeiſor, and turning him out of that occupancy which he has ſo illegally gained. But this right of poſſeſſion is of two ſorts: an *apparent* right of poſſeſſion, which may be defeated by proving a better; and an *actual* right of poſſeſſion, which will ſtand the teſt againſt all opponents. Thus if the diſſeiſor, or other wrongdoer, dies poſſeſſed of the land whereof he ſo became ſeiſed by his own unlawful act, and the ſame deſcends to his heir; now by the common law the heir hath obtained an *apparent* right, though the *actual* right of poſſeſſion reſides in the perſon diſſeiſed; and it ſhall not be lawful for the perſon diſſeiſed to deveſt this apparent right by mere entry or other act of his own, but only by an action at law[b]: for, until the contrary be proved by legal demonſtration, the law will rather preſume the right to

[b] Litt. § 385.

reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feodal law, which, after feuds became hereditary, much favoured the right of descent; in order that there might be a person always upon the spot to perform the feodal duties and services [c]: and therefore, when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feodal court. But if he, who has the actual right of possession, puts in his claim and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action, within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; *viz.*

III. THE mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right*, *jus merum;* and the estate of the owner is in such cases said to be totally devested, and *put to a right* [d]. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, t[he] presumptive evidence of that right is strongly in favour [of] his antagonist; who has thereby obtained the absolute rig[ht] of possession. As, in the first place, if a person disseise[d] or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession:

[c] Gilb. Ten. 18.

[d] Co. Litt. 345.

for

for the law presumes that either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he has procured a sufficient title; and, therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet, still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right: but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession*, independent of the right of *property*: for the law presumes *prima facie* that the ancestor would not disinherit, or attempt to disinherit, his heir, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by shewing the absolute right of property to reside in another person. The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action, (that is, such wherein the right of possession only, and not that of property, is contested) and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.

THUS, if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of *possession*; but I still retain the *actual* right both of *possession* and *property*. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and I retain no-

thing but the *mere right of property*. And even this right of property will fail, or at leaſt it will be without a remedy, unleſs I purſue it within the ſpace of ſixty years. So alſo if the father be tenant in tail, and alienes the eſtate-tail to a ſtranger in fee, the alienee thereby gains the *right of poſſeſſion*, and the ſon hath only the *mere right* or *right of property*. And hence it will follow, that one man may have the *poſſeſſion*, another the *right of poſſeſſion*, and a third the *right of property*. For if tenant in tail infeoffs A in fee-ſimple, and dies, and B diſſeiſes A; now B will have the *poſſeſſion*, A the *right of poſſeſſion*, and the iſſue in tail the *right of property*. A may recover the poſſeſſion againſt B; and afterwards the iſſue in tail may evict A, and unite in himſelf the poſſeſſion, the right of poſſeſſion, and alſo the right of property. In which union conſiſts,

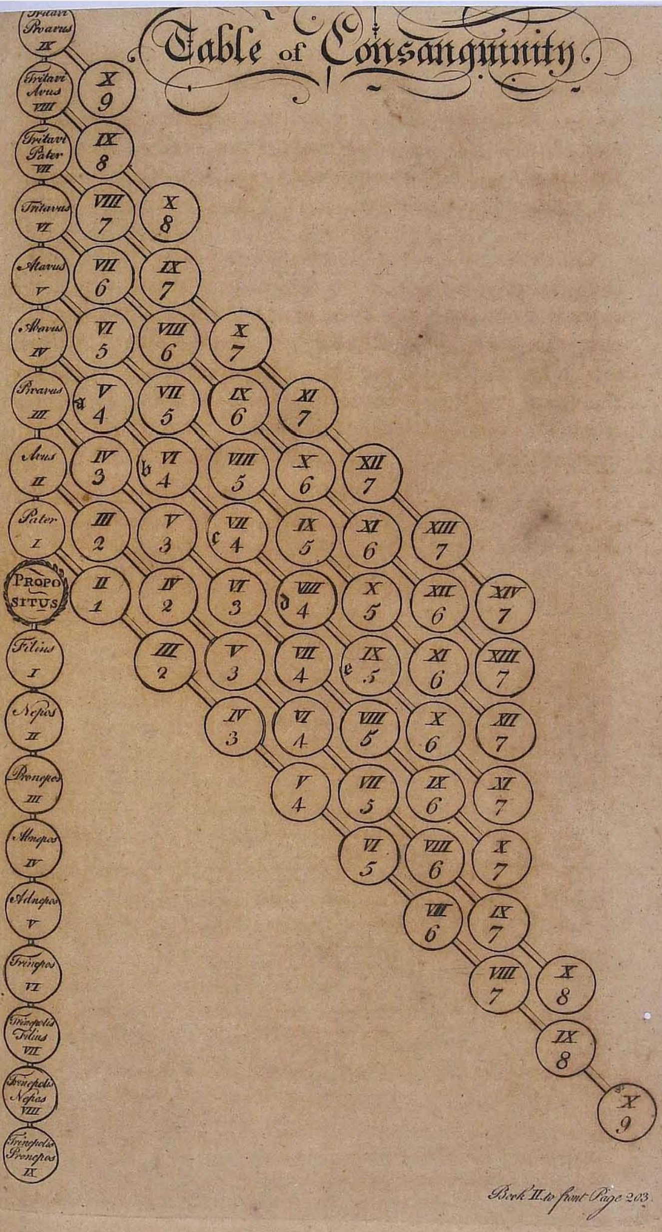
IV. A COMPLETE title to lands, tenements, and hereditaments. For it is an ancient maxim of the law [e], that no title is completely good, unleſs the right of poſſeſſion be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit* [f]. And when to this double right the actual poſſeſſion is alſo united, when there is, according to the expreſſion of Fleta [g], *juris et ſeiſinae conjunctio*, then, and then only, is the title completely legal.

[e] Mirr. *l.* 2. *c.* 27.

[f] Co. Litt. 266. Bract. *l.* 5. *tr.* 3. *c.* 5.

[g] *l.* 3. *c.* 15. § 5.

Table of Consanguinity



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CHAPTER THE FOURTEENTH.

OF TITLE BY DESCENT.

THE feveral gradations and ftages, requifite to form a complete title to lands, tenements, and hereditaments, having been briefly ftated in the preceding chapter, we are next to confider the feveral manners, in which this complete title (and therein principally the right of *propriety*) may be reciprocally loft and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we muft firft of all obferve, that (as gain and lofs are terms of relation, and of a reciprocal nature) by whatever method one man gains an eftate, by that fame method or it's correlative fome other man has loft it. As where the heir acquires by defcent, the anceftor has firft loft or abandoned his eftate by his death: where the lord gains land by efcheat, the eftate of the tenant is firft of all loft by the natural or legal extinction of all his hereditary blood: where a man gains an intereft by occupancy, the former owner has previoufly relinquifhed his right of poffeffion: where one man claims by prefcription or immemorial ufage, another man has either parted with his right by an antient and now forgotten grant, or has forfeited it by the fupinenefs or neglect of himfelf and his anceftors for ages: and fo, in cafe of forfeiture, the tenant by his own mifbehaviour or neglect has renounced his intereft in the eftate; whereupon it devolves to that perfon who by law may take advantage of fuch default: and, in alienation by common affurances, the two confiderations of lofs and acquifition are fo

interwoven, and fo conftantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of the grantor as the grantee.

THE methods therefore of acquiring on the one hand, and of lofing on the other, a title to eftates in things real, are reduced by our law to two: *defcent*, where the title is vefted in a man by the fingle operation of law; and *purchafe*, where the title is vefted in him by his own act or agreement[a] (1).

DESCENT, or hereditary fucceffion, is the title whereby a man on the death of his anceftor acquires his eftate by right of reprefentation, as his heir at law. An heir therefore is he upon whom the law cafts the eftate immediately on the death of the anceftor: and an eftate, fo defcending to the heir, is in law called the inheritance.

THE doctrine of defcents, or law of inheritances in fee-fimple, is a point of the higheft importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchafes, whereby the legal courfe of defcents is broken and altered, perpetually refer to this fettled law of inheritance, as a *datum* or firft principle univerfally known, and upon which their fubfequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly underftood without a previous knowlege of the law of defcents in fee-fimple. One may well perceive that this is an eftate confined in it's defcent to fuch heirs only of the donee, as have fprung or fhall fpring from his body; but who thofe heirs are, whether all his children both male and female, or

[a] Co. Litt. 18.

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(1) Purchafe in law is ufed in contradiftinction to defcent, and is any other mode of acquiring real property, *viz.* by devife, and every fpecies of gift, and grant; and as the land taken by purchafe has very different inheritable qualities from land taken by defcent, the diftinction is important. See page 241. *poft.*

the

the male only, and (among the males) whether the eldeſt, youngeſt, or other ſon alone, or all the ſons together, ſhall be his heir; this is a point, that we muſt reſult back to the ſtanding law of deſcents in fee-ſimple to be informed of.

IN order therefore to treat a matter of this univerſal conſequence the more clearly, I ſhall endeavour to lay aſide ſuch matters as will only tend to breed embarraſſment and confuſion in our inquiries, and ſhall confine myſelf entirely to this one object. I ſhall therefore decline conſidering at preſent who are, and who are not, capable of being heirs; reſerving that for the chapter of *eſcheats*. I ſhall alſo paſs over the frequent diviſion of deſcents in thoſe by *cuſtom*, *ſtatute*, and *common law*: for deſcents by *particular cuſtom*, as to all the ſons in gavelkind, and to the youngeſt in borough-engliſh, have already been often [b] hinted at, and may alſo be incidentally touched upon again; but will not make a ſeparate conſideration by themſelves, in a ſyſtem ſo general as the preſent: and deſcents by *ſtatute*, or fees-tail *per formam doni*, in purſuance of the ſtatute of Weſtminſter the ſecond, have alſo been already [c] copiouſly handled; and it has been ſeen that the deſcent in tail is reſtrained and regulated according to the words of the original donation, and does not entirely purſue the common law doctrine of inheritance; which, and which only, it will now be our buſineſs to explain. [202]

AND, as this depends not a little on the nature of kindred, and the ſeveral degrees of conſanguinity, it will be previouſly neceſſary to ſtate, as briefly as poſſible, the true notion of this kindred or alliance in blood [d].

CONSANGUINITY, or kindred, is defined by the writers on theſe ſubjects to be "*vinculum perſonarum ab eodem ſtipite* "*deſcendentium*;" the connexion or relation of perſons de-

b See Vol. I. pag. 74, 75. Vol. II. pag. 83. 85.

c See pag. 112, &c.

d For a fuller explanation of the doctrine of conſanguinity, and the conſequences reſulting from a right apprehenſion of it's nature, ſee *an eſſay on collateral conſanguinity*. (Law tracts, *Oxon.* 1762. 8vo. or 1771, 4to.)

ſcended

scended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

[203] LINEAL consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil[e], and canon[f], as in the common law[g].

THE doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees; and so many different bloods[h] is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate[i]. This lineal consanguinity, we may ob-

e *Ff.* 38. 10. 10.

f *Decretal. l.* 4. *tit.* 14.

g Co. Litt. 23.

h *Ibid.* 12.

i This will seem surprizing to those who are unacquainted with the encreasing power of progressive numbers: but is palpably evident from the following table of a geometrical progression, in which the first term is 2, and the denominator also

ſerve, falls ſtrictly within the definition of *vinculum perſonarum ab eodem ſtipite deſcendentium*; ſince lineal relations are ſuch as deſcend one from the other, and both of courſe from the ſame common anceſtor.

COLLATERAL kindred anſwers to the ſame deſcription: collateral relations agreeing with the lineal in this, that they deſcend from the ſame ſtock or anceſtor; but differing in this, that they do not deſcend one from the other. Collateral kinſmen are ſuch then as lineally ſpring from one and the ſame anceſtor, who is the *ſtirps*, or root, the *ſtipes*, trunk, or common ſtock, from whence theſe relations are branched out. As if John Stiles hath two ſons, who have

alſo 2: or, to ſpeak more intelligibly, it is evident, for that each of us has two anceſtors in the firſt degree; the number of whom is doubled at every remove, becauſe each of our anceſtors has alſo two immediate anceſtors of his own.

Lineal Degrees.	*Number of Anceſtors.*
1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072
18	262144
19	524288
20	1048576

A ſhorter method of finding the number of anceſtors at any even degree is by ſquaring the number of anceſtors at half that number of degrees. Thus 16 (the number of anceſtors at four degrees) is the ſquare of 4, the number of anceſtors at two; 256 is the ſquare of 16; 65536 of 256; and the number of anceſtors at 40 degrees would be the ſquare of 1048576, or upwards of a million millions.

each

each a numerous iſſue; both theſe iſſues are lineally deſcended from John Stiles as their common anceſtor; and they are collateral kinſmen to each other, becauſe they are all deſcended from this common anceſtor, and all have a portion of his blood in their veins, which denominates them *conſanguineos.*

WE muſt be careful to remember, that the very being of collateral conſanguinity conſiſts in this deſcent from one and the ſame common anceſtor. Thus *Titius* and his brother are related; why? becauſe both are derived from one father: *Titius* and his firſt couſin are related; why? becauſe both deſcend from the ſame grandfather; and his ſecond couſin's claim to conſanguinity is this, that they are both derived from one and the ſame great-grandfather. In ſhort, as many anceſtors as a man has, ſo many common ſtocks he has, from which collateral kinſmen may be derived. And as we are taught by holy writ, that there is one couple of anceſtors belonging to us all, from whom the whole race of mankind is deſcended, the obvious and undeniable conſequence is, that all men are in ſome degree related to each other. For indeed, if we only ſuppoſe each couple of our anceſtors to have left, one with another, two children; and each of thoſe children on an average to have left two more; (and, without ſuch a ſuppoſition, the human ſpecies muſt be daily diminiſhing) (2) we ſhall find that all of us have now ſubſiſting near two hundred and ſeventy millions of kindred in the fifteenth

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(2) To keep population without increaſe or diminution, each child muſt not produce two, but only one upon an average, that is, every one muſt leave another to ſupply his or her place: it is true then that every two muſt leave two; but every married couple muſt, upon an average, produce conſiderably more than two; for they muſt leave two to ſupply their own places, and alſo others to ſupply the great number of thoſe who die without contributing to the ſtock of population. But if we ſuppoſe the number of the ſexes equal; it is then true that each individual male, and individual female, muſt produce two upon an average; or we can ſay, that every woman that is born muſt, upon an average, bear two children; and conſequently every married woman conſiderably more.

degree,

degree, at the ſame diſtance from the ſeveral common anceſtors as ourſelves are; beſides thoſe that are one or two deſcents nearer to or farther from the common ſtock, who may amount to as many more [k]. And, if this calculation ſhould

[k] This will ſwell more conſiderably than the former calculation; for here, though the firſt term is but 1, the denominator is 4; that is, there is *one* kinſman (a brother) in the firſt degree, who makes, together with the *propoſitus*, the two deſcendants from the firſt couple of anceſtors; and in every other degree the number of kindred muſt be the *quadruple* of thoſe in the degree which immediately precedes it. For, ſince each couple of anceſtors has two deſcendants, who encreaſe in a duplicate *ratio*, it will follow that the *ratio*, in which all the deſcendants encreaſe downwards, muſt be double to that in which the anceſtors encreaſe upwards: but we have ſeen that the anceſtors encreaſe upwards in a duplicate *ratio*: therefore the deſcendants muſt encreaſe downwards in a double duplicate, that is, in a quadruple, *ratio* (3).

Collateral

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(3) The learned Judge's reaſoning is juſt and correct; and that the collateral relations are quadrupled in each generation may be thus demonſtrated:—As we are ſuppoſed, upon an average, to have one brother or ſiſter, the two children by the father's brother or ſiſter will make two couſins, and the mother's brother or ſiſter will produce two more, in all, four. How the ſame reaſon, my father and mother muſt each have had four couſins, and their children are my ſecond couſins; ſo I have eight ſecond couſins by my father, and eight by my mother; together ſixteen. And thus again, I ſhall have 32 third-couſins on my father's ſide, and 32 on my mother's, in all, 64. Hence it follows that each number muſt be multiplied by twice two or four.

This immenſe increaſe of the numbers depends upon the ſuppoſition that no one marries a relation; but to avoid ſuch a match, it will very ſoon be neceſſary to leave the kingdom. How theſe two tables of conſanguinity may be reduced by the intermarriage of relations, will appear from the following ſimple caſe: If two men and two women were put upon an uninhabited iſland, and became two married couple, if they had only two children each, a male and female, who intermarried, and in like manner produced two children, who are thus continued *ad infinitum*; it is clear, that there would never be more than four perſons in each generation; and if the parents lived to ſee their great grandchildren, the whole number would never be more than ſixteen; and thus the families might be perpetuated without any inceſtuous connexion.

appear incompatible with the number of inhabitants on the earth, it is becauſe, by intermarriages among the ſeveral deſcendants from the ſame anceſtor, a hundred or a thouſand modes of conſanguinity may be conſolidated in one perſon, or he may be related to us a hundred or a thouſand different ways.

[206] THE method of computing theſe degrees in the canon law [l], which our law has adopted [m], is as follows. We begin at the common anceſtor, and reckon downwards; and in whatſoever degree the two perſons, or the moſt remote of them, is diſtant from the common anceſtor, that is the degree in which they are related to each other. Thus *Titius*

Collateral Degrees.	*Number of Kindred.*
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

This calculation may alſo be formed by a more compendious proceſs, *viz.* by ſquaring the couples, or half the number, of anceſtors at any given degree; which will furniſh us with the number of kindred we have in the ſame degree, at equal diſtance with ourſelves from the common ſtock, beſides thoſe at unequal diſtances. Thus, in the tenth lineal degree, the number of anceſtors is 1024; it's half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the ſquare of 512: And if we will be at the trouble to recollect the ſtate of the ſeveral families within our own knowledge, and obſerve how far they agree with this account; that is, whether, on an average, every man has not one brother or ſiſter, four firſt couſins, ſixteen ſecond couſins, and ſo on; we ſhall find that the preſent calculation is very far from being overcharged.

[l] *Decretal.* 4. 14. 3 & 9.

[m] Co. Litt. 23.

and his brother are related in the first degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; *viz.* his own grandfather, the father of *Titius*. Or, (to give a more illustrious instance from our English annals) king Henry the seventh, who slew Richard the third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus* therefore in the table of consanguinity represent king Richard the third, and the class marked (e) king Henry the seventh. Now their common stock or ancestor was king Edward the third, the *abavus* in the same table: from him to Edmond duke of York, the *proavus*, is one degree; to Richard earl of Cambridge, the *avus*, two; to Richard duke of York, the *pater*, three; to king Richard the third, the *propositus*, four: and from king Edward the third to John of Gant (a) is one degree; to John earl of Somerset (b) two; to John duke of Somerset (c) three; to Margaret countess of Richmond (d) four; to king Henry the seventh (e) five. Which last mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians, (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other; reckoning a degree for each person both ascending and descending) these two princes were related in the ninth degree: for from king Richard the third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York, three; to king Edward the third, the common ancestor, four; to John of Gant, five; to John earl of Somerset, six; to John duke of Somerset, seven; to Margaret countess of Richmond, eight; to king Henry the seventh, nine[n] (4).

[n] See the table of consanguinity annexed; wherein all the degrees of collateral kindred to the *propositus* are computed, so far as the tenth of the civilians

(4) The difference of the computation by the civil and canon laws may be expressed shortly thus; the civilians take the sum

THE nature and degrees of kindred being thus in ſome meaſure explained, I ſhall next proceed to lay down a ſeries of rules, or canons of inheritance, according to which eſtates are tranſmitted from the anceſtor to the heir; together with an explanatory comment, remarking their original and progreſs, the reaſons upon which they are founded, and in ſome caſes their agreement with the laws of other nations.

I. THE firſt rule is, that inheritances ſhall lineally deſcend to the iſſue of the perſon who laſt died actually ſeiſed, *in infinitum;* but ſhall never lineally aſcend.

To explain the more clearly both this and the ſubſequent rules, it muſt firſt be obſerved, that by law no inheritance can veſt, nor can any perſon be the actual complete heir of another, till the anceſtor is previouſly dead. *Nemo eſt haeres viventis.* Before that time the perſon who is next in the line of ſucceſſion is called an heir apparent, or heir preſumptive. Heirs apparent are ſuch, whoſe right of inheritance is indefeaſible, provided they outlive the anceſtor; as the eldeſt

lians and the ſeventh of the canoniſt's incluſive; the former being diſtinguiſhed by the numeral letters, the latter by the common cyphers.

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of the degrees in both lines to the common anceſtor; the canoniſts take only the number of degrees in the longeſt line. Hence when the canon law prohibits all marriages between perſons related to each other within the ſeventh degree, this would reſtrain all marriages within the 14th degree of the civil law. In the 1 vol. 435. n. 2. it is obſerved, that all marriages are prohibited between perſons who are related to each other within the third degree, according to the computation of the civil law. This affords a ſolution to the vulgar paradox, that firſt couſins may marry, and ſecond couſins cannot. For firſt couſins and all couſins may marry by the civil law; and neither firſt nor ſecond couſins can marry by the canon law. But all the prohibitions of the canon law might have been diſpenſed with. It is ſaid, that the canon law computation has been adopted by the law of England; yet I do not know a ſingle inſtance in which we have occaſion to refer to it. But the civil law computation is of great importance in aſcertaining who are entitled to the adminiſtration, and to the diſtributive ſhares, of inteſtate perſonal property. See *poſt*, 504. 515.

ſon

ſon or his iſſue, who muſt by the courſe of the common law be heir to the father whenever he happens to die. Heirs preſumptive are ſuch who, if the anceſtor ſhould die immediately, would in the preſent circumſtances of things be his heirs; but whoſe right of inheritance may be defeated by the contingency of ſome nearer heir being born: as a brother, or nephew, whoſe preſumptive ſucceſſion may be deſtroyed by the birth of a child; or a daughter, whoſe preſent hopes may be hereafter cut off by the birth of a ſon. Nay, even if the eſtate hath deſcended, by the death of the owner, to ſuch brother, or nephew, or daughter; in the former caſes, the eſtate ſhall be deveſted and taken away by the birth of a poſthumous child; and, in the latter, it ſhall alſo be totally deveſted by the birth of a poſthumous ſon [o] (5).

WE muſt alſo remember, that no perſon can be properly ſuch an anceſtor, as that an inheritance of lands or tenements can be derived from him, unleſs he hath had actual ſeiſin of ſuch lands, either by his own entry, or by the poſſeſſion of his own or his anceſtor's leſſee for years, or by receiving rent from a leſſee of the freehold [p]: or unleſs he hath had what is equivalent to corporal ſeiſin in hereditaments that are incor- [209]

o Bro. *tit. deſcent.* 58. p Co. Litt. 15.

(5) But beſides the caſe of a poſthumous child, if lands are given to a ſon, who dies, leaving a ſiſter his heir; if the parents have, at any diſtance of time afterwards, another ſon, this ſon ſhall deveſt the deſcent upon the ſiſter, and take the eſtate as heir to his brother. *Co. Litt.* 11. *Doct. & Stud.* 1 *Dial. c.* 7. So the ſame eſtate may be frequently deveſted by the ſubſequent birth of nearer preſumptive heirs, before it fixes upon an heir apparent. As if an eſtate is given to an only child, who dies, it may deſcend to an aunt, who may be ſtripped of it by an after-born uncle, on whom a ſubſequent ſiſter may enter, and who will again be deprived of the eſtate by the birth of a brother.

It ſeems to be determined, that every one has a right to retain the rents and profits, which accrued whilſt he was thus legally poſſeſſed of the inheritance. *Harg. Co. Litt.* 11. 2 *Wilſ.* 526.

 poreal;

poreal; ſuch as the receipt of rent, a preſentation to the church in caſe of an advowſon [q], and the like. But he ſhall not be accounted an anceſtor, who hath had only a bare right or title to enter or be otherwiſe ſeiſed. And therefore all the caſes, which will be mentioned in the preſent chapter, are upon the ſuppoſition that the deceaſed (whoſe inheritance is now claimed) was the laſt perſon actually ſeiſed thereof. For the law requires this notoriety of poſſeſſion, as evidence that the anceſtor had that property in himſelf, which is now to be tranſmitted to his heir. Which notoriety had ſucceeded in the place of the antient feodal inveſtiture, whereby, while feuds were precarious, the vaſal on the deſcent of lands was formerly admitted in the lord's court (as is ſtill the practice in Scotland) and there received his ſeiſin, in the nature of a renewal of his anceſtor's grant, in the preſence of the feodal peers: till at length, when the right of ſucceſſion became indefeaſible, an entry on any part of the lands within the county (which if diſputed was afterwards to be tried by thoſe peers) or other notorious poſſeſſion, was admitted as equivalent to the formal grant of ſeiſin, and made the tenant capable of tranſmitting his eſtate by deſcent. The ſeiſin therefore of any perſon, thus underſtood, makes him the root or ſtock, from which all future inheritance by right of blood muſt be derived: which is very briefly expreſſed in this maxim, *ſeiſina facit ſtipitem* [r] (6).

[210] WHEN therefore a perſon dies ſo ſeiſed, the inheritance firſt goes to his iſſue: as if there be Geoffrey, John, and Matthew, grandfather, father, and ſon; and John purchaſes lands, and dies; his ſon Matthew ſhall ſucceed him as heir, and not the grandfather Geoffrey; to whom the land ſhall never aſcend, but ſhall rather eſcheat to the lord [s].

THIS rule, ſo far as it is affirmative and relates to lineal deſcents, is almoſt univerſally adopted by all nations; and it

q Co. Litt. 11.
r Flet. *l.* 6. *c.* 2. § 2.
s Litt § 3.

(6) See examples of this, page 228, note, *poſt*.

ſeems founded on a principle of natural reaſon, that (whenever a right of property tranſmiſſible to repreſentatives is admitted) the poſſeſſions of the parents ſhould go, upon their deceaſe, in the firſt place to their children, as thoſe to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total excluſion of parents and all lineal anceſtors from ſucceeding to the inheritance of their offspring, is peculiar to our own laws, and ſuch as have been deduced from the ſame original. For, by the Jewiſh law, on failure of iſſue, the father ſucceeded to the ſon, in excluſion of brethren, unleſs one of them married the widow and raiſed up ſeed to his brother [t]. And, by the laws of Rome, in the firſt place the children or lineal deſcendants were preferred; and, on failure of theſe, the father and mother or lineal aſcendants ſucceeded together with the brethren and ſiſters [v]; though by the law of the twelve tables the mother was originally, on account of her ſex, excluded [u]. Hence this rule of our laws has been cenſured and declaimed againſt, as abſurd and derogating from the maxims of equity and natural juſtice [w]. Yet that there is nothing unjuſt or abſurd in it, but that on the contrary it is founded upon very good legal reaſon, may appear from conſidering as well the nature of the rule itſelf, as the occaſion of introducing it into our laws.

WE are to reflect, in the firſt place, that all rules of ſucceſſion to eſtates are creatures of the civil polity, and *juris poſitivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the preſent poſſeſſor: after which the land by the law of nature would again become common, and liable to be ſeiſed by the next occupant: but ſociety, to prevent the miſchiefs that might enſue from a doctrine ſo productive of contention, has eſtabliſhed conveyances, wills, and ſucceſſions; whereby the property originally gained by poſſeſſion is continued and [211]

t Selden. *de ſucceſſ. Ebraeor.* c. 12.
v *Ff.* 38. 15 1. *Nov.* 118. 127.
u *Inſt.* 3. 3. 1.
w Craig. *de jur. feud.* l. 2. t. 13. § 15. Locke on gov. part 1. § 90.

transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

IF we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feodal tenures. For it was an express rule of the feodal law [x], that *successionis feudi talis est natura, quod ascendentes non succedunt;* and therefore the same maxim obtains also in the French law to this day [y]. Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line [z]: but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the second, we find it laid down as established law [a], that *haereditas nunquam ascendit;* which has remained an invariable maxim ever since. These circumstances evidently shew this rule to be of feodal original; and, taken in that light, there are some
[212] arguments in its favour, besides those which are drawn merely from the reason of the thing. For if the feud of which the son died seised, was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feodal constitutions [b]; which was founded as well upon the personal merit of the

x 2 *Feud.* 50.

y Domat. *p.* 2. *l.* 2. *t.* 2. Montesq. *Esp. L. l.* 31 *c.* 33.

z *LL. Hen. I. c.* 70.

a *l.* 7. *c.* 1.

b 1 *Feud.* 20.

vasal,

vaſal, which might be tranſmitted to his children, but could not aſcend to his progenitors, as alſo upon this conſideration of military policy, that the decrepit grandſire of a vigorous vaſal would be but indifferently qualified to ſucceed him in his feodal ſervices. Nay, even if this *feudum novum* were held by the ſon *ut feudum antiquum*, or with all the qualities annexed of a feud deſcended from his anceſtors, ſuch feud muſt in all reſpects have deſcended as if it had been really an antient feud; and therefore could not go to the father, becauſe, if it had been an antient feud, the father muſt have been dead before it could have come to the ſon. Thus whether the feud was ſtrictly *novum*, or ſtrictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of theſe caſes the father could poſſibly ſucceed. Theſe reaſons, drawn from the hiſtory of the rule itſelf, ſeem to be more ſatisfactory than that quaint one of Bracton [c], adopted by ſir Edward Coke [d], which regulates the deſcent of lands acording to the laws of gravitation (7).

[c] *Deſcendit itaque jus, quaſi ponderoſum quid cadens deorſum recta linea, et nunquam reaſcendit. l. 2. c. 29.*

[d] 1 Inſt. 11.

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(7) However ingenious and ſatisfactory theſe reaſons may appear, there is little conſiſtency in the application of them; for if the father does not ſucceed to the eſtate, becauſe it muſt be preſumed that it has paſſed him in the courſe of deſcent, the ſame reaſon would prevent an elder brother from taking an eſtate by deſcent from the younger.

And if it does not paſs to the father, leſt the lord ſhould have been attended by an aged decrepit feudatory, the ſame principle would be ſtill ſtronger to exclude the father's eldeſt brother from the inheritance, who is now permitted to ſucceed to his nephew. The father may take his ſon's eſtate by an intermediate deſcent; for if the ſon has neither iſſue, nor brothers or ſiſters, the eſtate will deſcend to an uncle, or ſome collateral relation, to whom the father may be the next heir. But in ſome caſes the father or mother may inherit immediately from a child. And this may happen when either the huſband or wife is heir to the other. As if the huſband is heir to the

 wife,

II. A SECOND general rule or canon is, that the male iſſue ſhall be admitted before the female.

[213] THUS ſons ſhall be admitted before daughters; or, as our male lawgivers have ſomewhat uncomplaiſantly expreſſed it, the worthieſt of blood ſhall be preferred[c]. As if John Stiles hath two ſons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; firſt Matthew, and (in caſe of his death without iſſue) then Gilbert, ſhall be admitted to the ſucceſſion in preference to both the daughters.

THIS preference of males to females is entirely agreeable to the law of ſucceſſion among the Jews[f], and alſo among the ſtates of Greece, or at leaſt among the Athenians[g]; but was totally unknown to the laws of Rome[h], (ſuch of them, I mean, as are at preſent extant) wherein brethren and ſiſters were allowed to ſucceed to equal portions of the inheritance. I ſhall not here enter into the comparative merit of the Roman and the other conſtitutions in this particular, nor examine into the greater dignity of blood in the male or female ſex: but ſhall only obſerve, that our preſent preference of males to females ſeems to have ariſen entirely from the feodal

c Hal. H. C. L. 235.
f Numb. c. 27.
g Petit. *LL. Attic. l.* 6. *t.* 6.
h *Inſt.* 3. 1. 6.

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wife, and ſhe dies ſeiſed of an eſtate, which deſcends to an only child, if that child dies without iſſue, the father will take the eſtate by an immediate deſcent, agreeably to the maxim, *que doit inheriter al pere, doit inheriter al fitz*; yet in this caſe he does not inherit as father, but as a collateral kinſman. See ſuch a caſe, 2 *P. Wms.* 613. The ſtudent muſt be careful to recollect that the rules of ſucceſſion to inteſtate perſonal property are very different from theſe rules of deſcent of real property and hereditaments. For if a child dies inteſtate without wife or iſſue, his father will take the whole of his perſonal property; and if there be no father living, the mother will have an equal ſhare with the brothers and ſiſters. See page 516. *&c.*

law.

law. For though our Britiſh anceſtors, the Welſh, appear to have given a preference to males [i], yet our Daniſh predeceſſors (who ſucceeded them) ſeem to have made no diſtinction of ſexes, but to have admitted all the children at once to the inheritance [k]. But the feodal law of the Saxons on the continent (which was probably brought over hither, and firſt altered by the law of king Canute) gives an evident preference of the male to the female ſex. "*Pater aut mater, defuncti, filio non filiæ haereditatem relinquent. . . . . . Qui defunctus non filios ſed filias reliquerit, ad eas omnis haereditas pertineat* [l]." It is poſſible therefore that this preference might be a branch of that imperfect ſyſtem of feuds, which obtained here before the conqueſt; eſpecially as it ſubſiſts among the cuſtoms of gavelkind, and as, in the charter or laws of king Henry the firſt, it is not (like many Nor- [214]
man innovations) given up, but rather enforced [m]. The true reaſon of preferring the males muſt be deduced from feodal principles: for, by the genuine and original policy of that conſtitution, no female could ever ſucceed to a proper feud [n], inaſmuch as they were incapable of performing thoſe military ſervices, for the ſake of which that ſyſtem was eſtabliſhed. But our law does not extend to a total excluſion of females, as the Salic law, and others, where feuds were moſt ſtrictly retained: it only poſtpones them to males; for, though daughters are excluded by ſons, yet they ſucceed before any collateral relations: our law, like that of the Saxon feudiſts before-mentioned, thus ſteering a middle courſe, between the abſolute rejection of females, and the putting them on a footing with males.

III. A THIRD rule, or canon of deſcent, is this; that where there are two or more males in equal degree, the eldeſt only ſhall inherit; but the females all together.

As if a man hath two ſons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew his

i *Stat. Wall.* 12 Edw. I.
k *LL. Canut. c.* 68.
l *Ibid.* 7. § 1 & 4.
m *c.* 70.
n 1 *Feud.* 8.

eldeſt ſon ſhall alone ſucceed to his eſtate, in excluſion of Gilbert the ſecond ſon and both the daughters; but, if both the ſons die without iſſue before the father, the daughters Margaret and Charlotte ſhall both inherit the eſtate as coparceners [o].

THIS right of primogeniture in males ſeems anticntly to have only obtained among the Jews, in whoſe conſtitution the eldeſt ſon had a double portion of the inheritance [p]; in the ſame manner as with us, by the laws of king Henry the firſt [q], the eldeſt ſon had the capital fee or principal feud [215] of his father's poſſeſſions, and no other pre-eminence; and as the eldeſt daughter had afterwards the principal manſion, when the eſtate deſcended in coparcenary [r]. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudiſts, divided the lands equally; ſome among all the children at large, ſome among the males only. This is certainly the moſt obvious and natural way; and has the appearance, at leaſt in the opinion of younger brothers, of the greateſt impartiality and juſtice. But when the emperors began to create honorary feuds, or titles of nobility, it was found neceſſary (in order to preſerve their dignity) to make them impartible [s], or (as they ſtiled them) *feuda individua*, and in conſequence deſcendible to the eldeſt ſon alone. This example was farther enforced by the inconveniencies that attended the ſplitting of eſtates; namely, the diviſion of the military ſervices, the multitude of infant tenants incapable of performing any duty, the conſequential weakening of the ſtrength of the kingdom, and the inducing younger ſons to take up with the buſineſs and idleneſs of a country life, inſtead of being ſerviceable to themſelves and the public, by engaging in mercantile, in military, in civil, or in eccleſiaſtical employments [t]. Theſe reaſons occaſioned an almoſt total change in the method of feodal inheritances abroad; ſo that the eldeſt male began univerſally to ſucceed to the

[o] Litt. § 5. Hale. H. C. L. 238.
[p] Selden. *de ſucc. Ebr. c.* 5.
[q] *c.* 70.
[r] Glanvil. *l.* 7. *c.* 3.
[s] 2 *Feud.* 55.
[t] Hale. H. C. L. 221.

whole

whole of the lands in all military tenures: and in this condition the feodal conſtitution was eſtabliſhed in England by William the conqueror.

YET we find, that ſocage eſtates frequently deſcended to all the ſons equally, ſo lately as when Glanvil[u] wrote, in the reign of Henry the ſecond; and it is mentioned in the mirror[w] as a part of our antient conſtitution, that knights' fees ſhould deſcend to the eldeſt ſon, and ſocage fees ſhould be partible among the male children. However in Henry the third's time we find by Bracton[x] that ſocage lands, in imitation of lands in chivalry, had almoſt entirely fallen into the right of ſucceſſion by primogeniture, as the law now ſtands: [216] except in Kent, where they gloried in the preſervation of their antient gavelkind tenure, of which a principal branch was the joint inheritance of all the ſons[y]; and except in ſome particular manors and townſhips, where their local cuſtoms continued the deſcent, ſometimes to all, ſometimes to the youngeſt ſon only, or in other more ſingular methods of ſucceſſion.

As to the females, they are ſtill left as they were by the antient law: for they were all equally incapable of performing any perſonal ſervice; and therefore one main reaſon of preferring the eldeſt ceaſing, ſuch preference would have been injurious to the reſt: and the other principal purpoſe, the prevention of the too minute ſubdiviſion of eſtates, was left to be conſidered and provided for by the lords, who had the diſpoſal of theſe female heireſſes in marriage. However, the ſucceſſion by primogeniture, even among females, took place as to the inheritance of the crown[z]; wherein the neceſſity of a ſole and determinate ſucceſſion is as great in the one ſex as the other. And the right of ſole ſucceſſion, though not of primogeniture, was alſo eſtabliſhed with reſpect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only

u *l.* 7. *c.* 3.
w *c.* 1. § 3.
x *l.* 2. *c.* 30, 31.
y Somner. Gavelk. 7.
z Co. Litt. 165.

daughters;

daughters; the eldest shall not of course be countess, but the dignity is in suspence or abeyance till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases[a] (8). In which disposition is preserved a strong trace of the antient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper—"*progressum est, ut* "*ad filios deveniret, in quem scilicet dominus hoc vellet bene-* "*cium confirmare*[b]."

IV. A FOURTH rule, or canon of descents, is this; that the lineal descendants, *in infinitum*, of any person deceased
[217] shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

a Co. Litt. 165. b 1 *Feud.* 1.

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(8) The king in the case of coparceners of a title of honour, may direct which one of them and her issue shall bear it; and if the issue of that one become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining. But upon the failure of the issue of all, except one, the descendant of that one being the sole heir, will have a right to claim, and to assume the dignity.

There are instances of a title, on account of a descent to females, being dormant, or in abeyance, for many centuries. *Harg. Co. Litt.* 165.

Lord Coke says, there is a difference in an office of honour, which shall be executed by the husband or deputy of the eldest. *Ib.* Yet when the office of great chamberlain had descended to two sisters coheiresses of the duke of Ancaster, one of whom was married to Peter Burrell, esq. the judges gave it as their opinion in the house of lords, "that the office belongs to both sisters; that the "husband of the eldest is not of right intitled to execute it; and "that both sisters may execute it by deputy, to be approved of "by them; such deputy not being of a degree inferior to a knight, "and to be approved of by the king." *Ib. et Journ. Dom. Proc.* May 25, 1781.

THUS

THUS the child, grandchild, or great grandchild (either male or female) of the eldeſt ſon ſucceeds before the younger ſon, and ſo *in infinitum* [c]. And theſe repreſentatives ſhall take neither more nor leſs, but juſt ſo much as their principals would have done. As if there be two ſiſters, Margaret and Charlotte; and Margaret dies, leaving ſix daughters; and then John Stiles the father of the two ſiſters dies, without other iſſue: theſe ſix daughters ſhall take among them exactly the ſame as their mother Margaret would have done, had ſhe been living; that is, a moiety of the lands of John Stiles in coparcenary: ſo that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the ſurviving ſiſter ſhall have ſix, and her ſix nieces, the daughters of Margaret, one apiece.

THIS taking by repreſentation is called ſucceſſion *in ſtirpes* according to the roots; ſince all the branches inherit the ſame ſhare that their root, whom they repreſent, would have done. And in this manner alſo was the Jewiſh ſucceſſion directed [d]; but the Roman ſomewhat differed from it. In the deſcending line the right of repreſentation continued *in infinitum*, and the inheritance ſtill deſcended *in ſtirpes*: as if one of three daughters died, leaving ten children, and then the father died; the two ſurviving daughters had each one third of his effects, and the ten grandchildren had the remaining third divided between them. And ſo among collaterals, if any perſon of equal degree with the perſons repreſented were ſtill ſubſiſting, (as if the deceaſed left one brother, and two nephews the ſons of another brother) the ſucceſſion was ſtill guided by the *roots*: but, if both the brethren were dead leaving iſſue, then (I apprehend) their repreſentatives in equal degree became themſelves principals, and ſhared the inheritance *per capita*, that is, ſhare and ſhare alike; they being themſelves now the next in degree to the [218] anceſtor, in their own right, and not by right of repreſentation [e]. So, if the next heirs of *Titius* be ſix nieces, three by

[c] Hale. H. C. L. 236, 237.
[d] Selden. *de ſucc. Ebr. c.* 1.
[e] *Nov.* 110. *c.* 3. *Inſt.* 3. 1. 6.

one

one ſiſter, two by another, and one by a third; his inheritance by the Roman law was divided into ſix parts, and one given to each of the nieces: whereas the law of England in this caſe would ſtill divide it only into three parts, and diſtribute it *per ſtirpes*, thus; one third to the three children who repreſent one ſiſter, another third to the two who repreſent the ſecond, and the remaining third to the one child who is the ſole repreſentative of her mother.

THIS mode of repreſentation is a neceſſary conſequence of the double preference given by our law, firſt to the male iſſue, and next to the firſtborn among the males, to both which the Roman law is a ſtranger. For if all the children of three ſiſters were in England to claim *per capita*, in their own right as next of kin to the anceſtor, without any reſpect to the ſtocks from whence they ſprung, and thoſe children were partly male and partly female; then the eldeſt male among them would exclude not only his own brethren and ſiſters, but all the iſſue of the other two daughters; or elſe the law in this inſtance muſt be inconſiſtent with itſelf, and depart from the preference which it conſtantly gives to the males, and the firſtborn, among perſons in equal degree. Whereas, by dividing the inheritance according to the roots, or *ſtirpes*, the rule of deſcent is kept uniform and ſteady: the iſſue of the eldeſt ſon excludes all other pretenders, as the ſon himſelf (if living) would have done; but the iſſue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the ſame: and among theſe ſeveral iſſues, or repreſentatives of the reſpective roots, the ſame preference to males and the ſame right of primogeniture obtain, as would have obtained at the firſt among the roots themſelves, the ſons or daughters of the deceaſed. As if a man hath two ſons, A and B, and A dies leaving two
[219] ſons, and then the grandfather dies; now the eldeſt ſon of A ſhall ſucceed to the whole of his grandfather's eſtate: and if A had left only two daughters, they ſhould have ſucceeded alſo to equal moieties of the whole in excluſion of B and his iſſue. But if a man hath only three daughters, C, D,

and E; and C dies leaving two ſons, D leaving two daughters, and E leaving a daughter and a ſon who is younger than his ſiſter: here when the grandfather dies, the eldeſt ſon of C ſhall ſucceed to one third, in excluſion of the younger; the two daughters of D to another third in partnerſhip; and the ſon of E to the remaining third, in excluſion of his elder ſiſter. And the ſame right of repreſentation, guided and reſtrained by the ſame rules of deſcent, prevails downwards *in infinitum*.

YET this right does not appear to have been thoroughly eſtabliſhed in the time of Henry the ſecond, when Glanvil wrote: and therefore, in the title to the crown eſpecially, we find frequent conteſts between the younger (but ſurviving) brother and his nephew (being the ſon and repreſentative of the elder deceaſed) in regard to the inheritance of their common anceſtor: for the uncle is certainly nearer of kin to the common ſtock, by one degree, than the nephew; though the nephew, by repreſenting his father, has in him the right of primogeniture. The uncle alſo was uſually better able to perform the ſervices of the fief; and beſides had frequently ſuperior intereſt and ſtrength, to back his pretenſions and cruſh the right of his nephew. And even to this day, in the Lower Saxony, proximity of blood takes place of repreſentative primogeniture; that is, the younger ſurviving brother is admitted to the inheritance before the ſon of an elder deceaſed: which occaſioned the diſputes between the two houſes of Mecklenburg, Schwerin and Strelitz, in 1692[f]. Yet Glanvil, with us, even in the twelfth century, ſeems[g] to declare for the right of the nephew by repreſentation; provided the eldeſt ſon had not received a proviſion in lands from his father, (or as the civil law would call it) had not been foris-familiated, in his lifetime. King John, however, who kept [220]
his nephew Arthur from the throne, by diſputing this right of repreſentation, did all in his power to aboliſh it throughout the realm[h]: but in the time of his ſon, king Henry the

[f] Mod. Un. Hiſt. xlii. 334.
[g] *l.* 7. *c.* 3.
[h] Hale. H. C. L. 217. 229.

third,

third, we find the rule indifputably fettled in the manner we have here laid it down [i], and fo it has continued ever fince. And thus much for lineal defcents.

V. A FIFTH rule is, that on failure of lineal defcendants, or iffue, of the perfon laft feifed, the inheritance fhall defcend to his collateral relations, being of the blood of the firft purchafor; fubject to the three preceding rules.

THUS if Geoffrey Stiles purchafes land, and it defcends to John Stiles his fon, and John dies feifed thereof without iffue; whoever fucceeds to this inheritance muft be of the blood of Geoffrey the firft purchafor of this family [k] (9). The firft purchafor, *perquifitor*, is he who firft acquired the eftate to his family, whether the fame was transferred to him by fale or by gift, or by any other method, except only that of defcent.

THIS is a rule almoft peculiar to our own laws, and thofe of a fimilar original. For it was entirely unknown among

[i] Bracton. *l.* 2. *c.* 30. § 2. [k] Co. Litt. 12.

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(9) To be of the blood of Geoffrey, is either to be immediately defcended from him, or to be defcended from the fame couple of common anceftors. Two perfons are *confanguinei*, or are of the blood (that is, whole blood) of each other, who are defcended from the fame two anceftors.

The heir and anceftor muft not only have two common anceftors with the original purchafor of the eftate, but muft have two common anceftors with each other; and therefore if the fon purchafes lands and dies without iffue, and it defcends to any heir on the part of the father, if the line of the father fhould afterwards become extinct, it cannot pafs to the line of the mother. *Hale's Hift. C. L.* 246. 49 *E.* 3. 12. And for the fame reafon if it fhould defcend to the line of any female, it can never afterwards, upon failure of that line, be tranfmitted to the line of any other female, for according to the next rule, *viz.* the fixth, the heir of the perfon laft feifed muft be a collateral kinfman of the whole blood.

the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seised of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy[l] agrees with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feodal original; and this rule or canon cannot otherwise be accounted for than by recurring to feodal principles.

WHEN feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is lineally descended from, the first feudatory or purchasor. In conse- [221] quence whereof, if a vasal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vasal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule; "*frater* "*fratri, sine legitimo haerede defuncto, in beneficio quod eorum* "*patris fuit succedat: sin autem unus e fratribus a domino feu-* "*dum acceperit, eo defuncto sine legitimo haerede, frater ejus in* "*feudum non succedit*[m]." The true feodal reason for which rule was this; that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled) so in the feodal donation, "*nomen haeredis, in prima investitura expressum,* "*tantum ad descendentes ex corpore primi vasalli extenditur; et* "*non ad collaterales, nisi ex corpore primi vasalli sive stipitis* "*descendant*[n]:" the will of the donor, or original lord, (when feuds were turned from life estates into inheritances) not being to make them absolutely hereditary, like the Ro-

[l] *Gr. Coustum. c.* 25.

[m] 1 *Feud.* 1. § 2.

[n] Crag. *l.* 1. *t.* 9. § 36.

man

man *allodium*, but hereditary only *sub modo*; not hereditary to the collateral relations, or lineal anceſtors, or huſband, or wife of the feudatory, but to the iſſue deſcended from his body only.

HOWEVER, in proceſs of time, when the feodal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his anceſtors; and then the collateral relations were admitted to ſucceed even *in infinitum*, becauſe they might have been of the blood [222] of, that is deſcended from, the firſt imaginary purchaſor. For ſince it is not aſcertained in ſuch general grants, whether this feud ſhall be held *ut feudum paternum* or *feudum avitum*, but *ut feudum antiquum* merely; as a feud of indefinite antiquity; that is, ſince it is not aſcertained from which of the anceſtors of the grantee this feud ſhall be ſuppoſed to have deſcended; the law will not aſcertain it, but will ſuppoſe *any* of his anceſtors, *pro re nata*, to have been the firſt purchaſor: and therefore it admits *any* of his collateral kindred (who have the other neceſſary requiſites) to the inheritance, becauſe every collateral kinſman muſt be deſcended from ſome one of his lineal anceſtors.

OF this nature are all the grants of fee-ſimple eſtates of this kingdom; for there is now in the law of England no ſuch thing as a grant of a *feudum novum*, to be held *ut novum*; unleſs in the caſe of a fee-tail, and there we ſee that this rule is ſtrictly obſerved, and none but the lineal deſcendants of the firſt donee (or purchaſor) are admitted; but every grant of lands in fee-ſimple is with us a *feudum novum* to be held *ut antiquum*, as a feud whoſe antiquity is indefinite: and therefore the collateral kindred of the grantee, or deſcendants from any of his lineal anceſtors, by whom the lands might have poſſibly been purchaſed, are capable of being called to the inheritance.

YET, when an eſtate hath really deſcended in a courſe of inheritance to the perſon laſt ſeiſed, the ſtrict rule of the

feodal law is ſtill obſerved; and none are admitted, but the heirs of thoſe through whom the inheritance hath paſſed: for all others have demonſtrably none of the blood of the firſt purchaſor in them, and therefore ſhall never ſucceed. As, if lands come to John Stiles by deſcent from his mother Lucy Baker, no relation of his father (as ſuch) ſhall ever be his heir of theſe lands; and, *vice verſa*, if they deſcended from his father Geoffrey Stiles, no relation of his mother (as ſuch) ſhall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any ſhare of his father's blood. And ſo, if the eſtate deſcended from his father's father, George Stiles; the relations of his father's mother, Cecilia Kempe, ſhall for the ſame reaſon [223] never be admitted, but only thoſe of his father's father (10). This is alſo the rule of the French law [o], which is derived from the ſame feodal fountain.

HERE we may obſerve, that ſo far as the feud is really *antiquum*, the law traces it back, and will not ſuffer any to inherit but the blood of thoſe anceſtors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited it from his father Walter Stiles, or his mother Chriſtian Smith, or if it appear that his grandfather was the firſt grantee, and ſo took it (by the general law) as a feud of indefinite antiquity; in either of theſe caſes the law admits the deſcendants of any anceſtor of George Stiles, either paternal or mater-

[o] Domat. *part* 2. *pr.*

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(10) Hence the expreſſion *heir at law*, muſt always be uſed with a reference to a ſpecific eſtate; for if an only child has taken by deſcent an eſtate from his father, and another from his mother, upon his death without iſſue, theſe eſtates will deſcend to two different perſons: ſo alſo if his two grandfathers and two grandmothers had each an eſtate, which deſcended to his father or mother, whom I ſuppoſe alſo to be only children, then, as before, theſe four eſtates will deſcend to four different heirs.

 nal,

nal, to be in their due order the heirs to John Stiles of this estate: because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

THIS then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchasor; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended: according to the rule laid down in the year books [p], Fitzherbert [q], Brook [r], and Hale [s], "that he who "would have been heir to the father of the deceased" (and, of course, to the mother, or any other real or supposed purchasing ancestor) "shall also be heir to the son;" a maxim, that will hold universally, except in the case of a brother or sister of the half blood, which exception (as we shall see hereafter) depends upon very special grounds.

THE rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor

[224] was; which *in feudis vere antiquis* has in process of time been forgotten, and is supposed so to be in feuds that are held *ut antiquis*.

VI. A SIXTH rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.

FIRST, he must be his next collateral kinsman, either personally or *jure repreſentationis* (11); which proximity is reckoned

p *M.* 12 *Edw. IV.* 14.
q *Abr. t. diſcent.* 2.
r *Ibid.* 38.
s H. C. L. 243.

(11) This is only true in the paternal line; for when the paternal and maternal lines are both admitted to the inheritance, the most remote collateral kinsman *ex parte paternâ*, will inherit before the nearest *ex parte maternâ*. See p. 236. *post.*

koned according to the canonical degrees of conſanguinity before-mentioned. Therefore, the brother being in the firſt degree, he and his deſcendants ſhall exclude the uncle and his iſſue, who is only in the ſecond. And herein conſiſts the true reaſon of the different methods of computing the degrees of conſanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards conſanguinity principally with reſpect to ſucceſſions, and therein very naturally conſiders only the perſon deceaſed, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of perſons through whom the claim muſt be derived from him; and makes not only his great nephew but alſo his firſt-couſin to be both related to him in the fourth degree; becauſe there are three perſons between him and each of them. The canon law regards conſanguinity principally with a view to prevent inceſtuous marriages, between thoſe who have a large portion of the ſame blood running in their reſpective veins; and therefore looks up to the author of that blood, or the common anceſtor, reckoning the degrees from him; ſo that the great nephew is related in the third canonical degree to the perſon propoſed, and the firſt-couſin in the ſecond; the former being diſtant three degrees from the common anceſtor, (the father of the *propoſitus*) and therefore deriving only one fourth of his blood from the ſame fountain; the latter, and alſo the *propoſitus* himſelf, being each of them diſtant only two degrees from the common anceſtor, (the grandfather of each) and therefore having one half of each of their bloods the ſame. The common law regards conſanguinity principally with reſpect to deſcents; and, having therein the ſame object in view as the civil, it may ſeem as if it ought to proceed according to the civil computation. But as it alſo reſpects the purchaſing an- [225]
ceſtor, from whom the eſtate was derived, it therein reſembles the canon law, and therefore counts it's degrees in the ſame manner. Indeed the deſignation of perſon, in ſeeking for the next of kin, will come to exactly the ſame end (though the degrees will be differently numbered) whichever method of computation we ſuppoſe the law of England to uſe; ſince the

right of reprefentation, of the parent by the iffue, is allowed to prevail *in infinitum*(12). This allowance was abfolutely neceffary, elfe there would have frequently been many claimants in exactly the fame degree of kindred, as (for inftance) uncles and nephews of the deceafed; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endlefs confufion where the right of fole fucceffion, as with us, is eftablifhed. The iffue or defcendants therefore of John Stiles's brother are all of them in the firft degree of kindred with refpect to inheritances, thofe of his uncle in the fecond, and thofe of his great uncle in the third; as their refpective anceftors, if living, would have been; and are feverally called to the fucceffion in right of fuch their reprefentative proximity.

THE right of reprefentation being thus eftablifhed, the former part of the prefent rule amounts to this; that, on failure of iffue of the perfon laft feifed, the inheritance fhall defcend to the other fubfifting iffue of his next immediate anceftor. Thus, if John Stiles dies without iffue, his eftate fhall defcend to Francis his brother, or his reprefentatives; he being lineally defcended from Geoffrey Stiles, John's next immediate anceftor, or father. On failure of brethren, or fifters, and their iffue, it fhall defcend to the uncle of John Stiles, the lineal defcendant of his grandfather George, and fo on *in in-*

(12) The Editor conceives that the true and only way of afcertaining an heir at law in any line or branch, is by the reprefentation of brothers or fifters in each generation, and that the introduction of the computation of kindred, either by the canon or civil law, into a treatife upon defcents, may perplex and can never affift; for if we refer this fixth rule either to the civil or canon law, it will in many inftances be erroneous. It is certain that a great-grandfon of the father's brother will inherit before a fon of the grandfather's brother; yet the latter is the *next collateral kinfman* according to both the canon and civil computation; for the former is in the fourth degree by the canon, and the fixth by the civil law; the latter is in the third by the canon, and the fifth by the civil; but in the defcent of real property the former muft be preferred.

 finitum.

finitum. Very ſimilar to which was the law of inheritance among the antient Germans, our progenitors: "*haeredes ſucceſſoreſque, ſui cuique liberi, et nullum teſtamentum: ſi liberi non ſunt, proximus gradus in poſſeſſione, fratres, patrui, avunculi*[t]."

Now here it muſt be obſerved, that the lineal anceſtors, though (according to the firſt rule) incapable themſelves of ſucceeding to the eſtate, becauſe it is ſuppoſed to have already paſſed them, are yet the common ſtocks from which the next ſucceſſor muſt ſpring. And therefore in the Jewiſh law, which in this reſpect entirely correſponds with ours[u], the father or other lineal anceſtor is himſelf ſaid to be the heir, though long ſince dead, as being repreſented by the perſons of his iſſue; who are held to ſucceed not in their own rights, as brethren, uncles, *&c*, but in right of repreſentation, as the offſpring of the father, grandfather, *&c*, of the deceaſed[w]. But, though the common anceſtor be thus the root of the inheritance, yet with us it is not neceſſary to *name* him in making out the pedigree or deſcent. For the deſcent between two brothers is held to be an *immediate* deſcent; and therefore title may be made by one brother or his repreſentatives *to* or *through* another, without mentioning their common father[x]. If Geoffrey Stiles hath two ſons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey; and ſo the ſon of Francis may claim as couſin and heir to Matthew the ſon of John, without naming the grandfather; *viz.* as ſon of Francis, who was the brother of John, who was the father of Matthew. But though the common anceſtors are not named in deducing the pedigree, yet the law ſtill reſpects them as the fountains of inheritable blood: and therefore, in order to aſcertain the collateral heir of John Stiles, it is firſt neceſſary to recur to his anceſtors in the firſt degree; and if they have left any other iſſue beſides John, that iſſue will be his heir. On default of ſuch, we muſt aſcend one [226]

t Tacitus *de mor. Germ.* 21.
u Numb. c. 27.
w Selden. *de ſucc. Ebr.* c. 12.
x 1 Sid. 193. 1 Ventr. 423. 1 Lev. 60. 12 Mod. 619.

ſtep higher, to the anceſtors in the ſecond degree, and then to thoſe in the third, and fourth, and ſo upwards *in infinitum*; till ſome couple of anceſtors be found, who have other iſſue deſcending from them beſides the deceaſed, in a parallel or collateral line. From theſe anceſtors the heir of John Stiles muſt derive his deſcent; and in ſuch derivation the ſame
[227] rules muſt be obſerved, with regard to the ſex, primogeniture, and repreſentation, that have before been laid down with regard to lineal deſcents from the perſon of the laſt proprietor.

BUT, ſecondly, the heir need not be the neareſt kinſman abſolutely, but only *ſub modo*; that is, he muſt be the neareſt kinſman of the *whole* blood; for if there be a much nearer kinſman of the *half* blood, a diſtant kinſman of the whole blood ſhall be admitted, and the other entirely excluded: nay, the eſtate ſhall eſcheat to the lord, ſooner than the half blood ſhall inherit.

A KINSMAN of the whole blood is he that is derived, not only from the ſame anceſtor, but from the ſame couple of anceſtors. For, as every man's own blood is compounded of the bloods of his reſpective anceſtors, he only is properly of the whole or entire blood with another, who hath (ſo far as the diſtance of degrees will permit) all the ſame ingredients in the compoſition of his blood that the other hath. Thus, the blood of John Stiles being compoſed of thoſe of Geoffrey Stiles his father and Lucy Baker his mother, therefore his brother Francis, being deſcended from both the ſame parents, hath entirely the ſame blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a ſecond huſband, Lewis Gay, and hath iſſue by him; the blood of this iſſue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay (inſtead of Geoffrey Stiles) on the other part, it hath therefore only half the ſame ingredients with that of John Stiles; ſo that he is only his brother of the half blood, and for that reaſon they ſhall never inherit to each other. So alſo, if the father has two ſons, A and

and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue; still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised: but it shall descend to a sister (if any) of the whold blood to A: for in such cases the maxim is, that the seisin or *possessio fratris facit sororem esse haeredem.* Yet, had A died without entry, then B might have inherited; not as heir to A his half-bro- [228]
ther, but as heir to their common father, who was the person last actually seised [y] (13).

THIS total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchasor, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is,

[y] Hale. H. C. L. 238.

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(13) Of some inheritances there cannot be a seisin, or a *possessio fratris*; as if the eldest brother dies before a presentation to an advowson, it will descend to the half-brother as heir to the person last seised, and not to the sister of the whole blood. 1 *Burn. Ec.* 11. So of reversions, remainders, and executory devises, there can be no seisin or *possessio fratris*; and if they are reserved or granted to A and his heirs, he who is heir to A when they come into possession, is entitled to them by descent; that is, that person who would have been heir to A, if A had lived so long, and had then died actually seised. 2 *Woodd.* 256. *Fearne*, 448. 2 *Wils.* 29.

to make out the pedigree of the heir from the firſt donee or purchaſor, and to ſhew that ſuch heir was his lineal repreſentative. But when, by length of time and a long courſe of deſcents, it came (in thoſe rude and unlettered ages) to be forgotten who was really the firſt feudatory or purchaſor, and thereby the proof of an actual deſcent from him became impoſſible; then the law ſubſtituted what ſir Martin Wright[z] calls a *reaſonable*, in the ſtead of an *impoſſible*, proof: for it remits the proof of an actual deſcent from the firſt purchaſor; and only requires in lieu of it, that the claimant be next of the whole blood to the perſon laſt in poſſeſſion; (or derived from the ſame couple of anceſtors) which will probably anſwer the ſame end as if he could trace his pedigree in a direct line from the firſt purchaſor. For he who is my kinſman of the whole blood can have no anceſtors beyond or higher than the common ſtock, but what are equally my anceſtors alſo; and mine are *vice verſa* his: he therefore is very likely to be derived from that unknown anceſtor of mine, from whom the inheritance deſcended. But a kinſman of the half blood has but one half of his anceſtors above the common ſtock the ſame as mine; and therefore there is not the ſame probability of that ſtanding requiſite in the law, that he be derived from the blood of the firſt purchaſor.

[229] To illuſtrate this by example. Let there be John Stiles, and Francis, brothers, by the ſame father and mother, and another ſon of the ſame mother by Lewis Gay a ſecond huſband. Now, if John dies ſeiſed of lands, but it is uncertain whether they deſcended to him from his father or mother; in this caſe his brother Francis, of the whole blood, is qualified to be his heir; for he is ſure to be in the line of deſcent from the firſt purchaſor, whether it were the line of the father or the mother. But if Francis ſhould die before John, without iſſue, the mother's ſon by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his deſcent from the firſt purchaſor, who is unknown, nor has he that fair probability which the law admits as preſump-

[z] Tenures 186.

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tive evidence, ſince he is to the full as likely *not to be* deſcended from the line of the firſt purchaſor, as *to be* deſcended: and therefore the inheritance ſhall go to the neareſt relation poſſeſſed of this preſumptive proof, the whole blood.

AND, as this is the caſe *in feudis antiquis*, where there really did once exiſt a purchaſing anceſtor, who is forgotten; it is alſo the caſe *in feudis novis* held *ut antiquis*, where the purchaſing anceſtor is merely ideal, and never exiſted but only in fiction of law. Of this nature are all grants of lands in fee-ſimple at this day, which are inheritable as if they deſcended from ſome uncertain indefinite anceſtor, and therefore any of the collateral kindred of the real modern purchaſor (and not his own offspring only) may inherit them, provided they be of the whole blood; for all ſuch are, in judgment of law, likely enough to be derived from this indefinite anceſtor: but thoſe of the half blood are excluded, for want of the ſame probability. Nor ſhould this be thought hard, that a brother of the purchaſor, though only of the half blood, muſt thus be diſinherited, and a more remote relation of the whole blood admitted, merely upon a ſuppoſition and fiction of law: ſince it is only upon a like ſuppoſition and fiction, that brethren of purchaſors (whether of the whole or half blood) are entitled to inherit at all: for we have ſeen that *in feudis ſtricte novis* neither brethren nor any other collaterals were admitted. As therefore *in feudis antiquis* we [230] have ſeen the reaſonableneſs of excluding the half blood, if by a fiction of law a *feudum novum* be made deſcendible to collaterals as if it was *feudum antiquum*, it is juſt and equitable that it ſhould be ſubject to the ſame reſtrictions as well as the ſame latitude of deſcent.

PERHAPS by this time the excluſion of the half blood does not appear altogether ſo unreaſonable as at firſt ſight it is apt to do. It is certainly a very fine-ſpun and ſubtle nicety; but, conſidering the principles upon which our law is founded, it is not an injuſtice, nor always a hardſhip; ſince even the ſucceſſion of the whole blood was originally a beneficial indul-

indulgence, rather than the ſtrict right of collaterals: and, though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could poſſibly have enjoyed before. The doctrine of the whole blood was calculated to ſupply the frequent impoſſibility of proving a deſcent from the firſt purchaſor, without ſome proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpoſe it anſwers, for the moſt part, effectually enough. I ſpeak with theſe reſtrictions, becauſe it does not, neither can any other method, anſwer this purpoſe entirely. For though all the anceſtors of John Stiles, above the common ſtock, are alſo the anceſtors of his collateral kinſman of the whole blood; yet, unleſs that common ſtock be in the firſt degree, (that is, unleſs they have the ſame father and mother) there will be intermediate anceſtors below the common ſtock, that belong to either of them reſpectively, from which the other is not deſcended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other anceſtors, than what are in common to them both; yet with regard to his uncle, where the common ſtock is removed one degree higher, (that is, the grandfather and grandmother) one half of John's anceſtors will not be the anceſtors of his uncle: his *patruus*, or father's brother, derives not his deſcent from John's maternal anceſtors; nor his *avunculus*, or mother's brother, from thoſe in the paternal line. Here then
[231] the ſupply of proof is deficient, and by no means amounts to a certainty: and the higher the common ſtock is removed, the more will even the probability decreaſe. But it muſt be obſerved, that (upon the ſame principles of calculation) the half blood have always a much leſs chance to be deſcended from an unknown indefinite anceſtor of the deceaſed, than the whole blood in the ſame degree. As, in the firſt degree, the whole brother of John Stiles is ſure to be deſcended from that unknown anceſtor; his half brother has only an even chance, for half John's anceſtors are not his. So, in the ſecond degree, John's uncle of the whole blood has an even chance; but the chances are three to one againſt his uncle of the half blood,

blood, for three-fourths of John's anceſtors are not his. In like manner, in the third degree, the chances are only three to one againſt John's great uncle of the whole blood, but they are ſeven to one againſt his great uncle of the half blood, for ſeven-eights of John's anceſtors have no connexion in blood with him. Therefore the much leſs probability of the half blood's deſcent from the firſt purchaſor, compared with that of the whole blood, in the ſeveral degrees, has occaſioned a general excluſion of the half blood in all.

BUT, while I thus illuſtrate the reaſon of excluding the half blood in general, I muſt be impartial enough to own, that, in ſome inſtances, the practice is carried farther than the principle upon which it goes will warrant. Particularly, when a kinſman of the whole blood in a remoter degree, as the uncle or great uncle, is preferred to one of the half blood in a nearer degree, as the brother: for the half brother hath the ſame chance of being deſcended from the purchaſing anceſtor as the uncle; and a thrice (14) better chance than the great uncle, or kinſman in the third degree. It is alſo more eſpecially overſtrained, when a man has two ſons by different venters, and the eſtate on his death deſcends from him to the eldeſt, who enters, and dies without iſſue; in which caſe the younger ſon cannot inherit this eſtate, becauſe he is not of the whole blood to the laſt proprietor [z]. This, it muſt be owned, carries a hardſhip with it, even upon feodal princi-

z A ſtill harder caſe than this happened *M.* 10 *Edw. III.* On the death of a man, who had three daughters by a firſt wife, and a fourth by another, his lands deſcended equally to all four as coparceners. Afterwards the two eldeſt died without iſſue; and it was held, that the third daughter alone ſhould inherit their ſhares, as being their heir of the whole blood; and that the youngeſt daughter ſhould retain only her original fourth part of their common father's lands. (10 *Aſſ.* 27). And yet it was clear law in *M.* 19 *Edw. II.* that, where lands had deſcended to two ſiſters of the half blood, as coparceners, each might be heir of thoſe lands to the other. (Mayn. Edw. II. 628. Fitzh. *abr. tit. quare impedit*. 177.)

(14) This ought to be twice; for the half brother has one chance in two, the great uncle one in four; the chance of the half brother is therefore twice better than that of the great uncle.

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ples: for the rule was introduced only to ſupply the proof of a deſcent from the firſt purchaſor; but here, as this eſtate notoriouſly deſcended from the father, and as both the brothers confeſſedly ſprung from him, it is demonſtrable that the half brother muſt be of the blood of the firſt purchaſor, who was either the father or ſome of the father's anceſtors. When therefore there is actual demonſtration of the thing to be proved, it is hard to exclude a man by a rule ſubſtituted to ſupply that proof when deficient. So far as the inheritance can be evidently traced back, there ſeems no need of calling in this preſumptive proof, this rule of probability, to inveſtigate what is already certain. Had the elder brother indeed been a purchaſor, there would have been no hardſhip at all, for the reaſons already given: or had the *frater uterinus* only, or brother by the mother's ſide, been excluded from an inheritance which deſcended from the father, it had been highly reaſonable.

INDEED it is this very inſtance, of excluding a *frater conſanguineus*, or brother by the father's ſide, from an inheritance which deſcended *a patre*, that Craig [b] has ſingled out, on which to ground his ſtrictures on the Engliſh law of half blood. And, really, it ſhould ſeem as if originally the cuſtom of excluding the half blood in Normandy [c] extended only to exclude a *frater uterinus*, when the inheritance deſcended *a patre*, and *vice verſa*: and poſſibly in England alſo; as even with us it remained a doubt, in the time of Bracton [d], and of Fleta [e], whether the half blood on the father's ſide was excluded from the inheritance which originally deſcended from the common father, or only from ſuch as deſcended from the reſpective mothers, and from newly purchaſed lands. So alſo the rule of law, as laid
[233] down by our Forteſcue [f], extends no farther than this; *frater fratri uterino non ſuccedet in haereditate paterna.* It is moreover worthy of obſervation, that by our law, as it now ſtands, the crown (which is the higheſt inheritance in the na-

b *l.* 2. *t.* 15. § 14.
c *Gr. Couſtum. c.* 25.
d *l.* 2. *c.* 30. § 3.
e *l.* 6. *c.* 1. § 14.
f *de laud. LL. Angl.* 5.

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tion) may defcend to the half blood of the preceding fovereign [g], fo that it be the blood of the firft monarch, purchafor, (or in the feodal language) conqueror of the reigning family. Thus it actually did defcend from king Edward the fixth to queen Mary, and from her to queen Elizabeth, who were refpectively of the half blood to each other. For, the royal pedigree being always a matter of fufficient notoriety, there is no occafion to call in the aid of this prefumptive rule of evidence, to render probable the defcent from the royal ftock, which was formerly king William the Norman, and is now (by act of parliament [h]) the princefs Sophia of Hanover. Hence alfo it is, that in eftates-tail, where the pedigree from the firft donee muft be ftrictly proved, half blood is no impediment to the defcent [i]: becaufe, when the lineage is clearly made out, there is no need of this auxiliary proof (15). How far it might be defirable for the legiflature to give relief, by amending the law of defcents in one or two inftances, and ordaining that the half blood might always inherit, where the eftate notorioufly defcended from it's own proper anceftor, and, in cafes of new-purchafed lands or uncertain defcents, fhould never be excluded by the whole blood in a remoter degree; or how far a private inconvenience fhould be ftill fubmitted to, rather than a long eftablifhed rule fhould be fhaken, it is not for me to determine (16).

g Plowd. 245. Co. Litt. 15.
h 12 Will. III. c. 2.
i Litt. § 14, 15.

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(15) And alfo in titles of honour half blood is no impediment to the defcent; but a title can only be tranfmitted to thofe who are defcended from the firft perfon ennobled. *Co. Litt.* 15. Half blood is alfo no obftruction in the fucceffion to perfonal property. Page 505, *poft*.

(16) The learned Judge has exerted great ability and ingenuity in apologizing for the exclufion of the half blood. But whatever learning or eloquence may be difplayed in it's favour, I conceive nothing more in effect can be faid for it than this, *viz.* that if the half blood was univerfally admitted to inherit, an eftate might pafs out of one family into another, between whom there was no union of blood. As where a fon inherits an eftate from his father, and his mother

THE rule then, together with it's illuſtration, amounts to this: that, in order to keep the eſtate of John Stiles as nearly as poſſible in the line of his purchaſing anceſtor, it muſt deſcend to the iſſue of the neareſt couple of anceſtors that have left deſcendants behind them; becauſe the deſcendants of one anceſtor only are not ſo likely to be in the line of that purchaſing anceſtor, as thoſe who are deſcended from both.

[234] BUT here another difficulty ariſes. In the ſecond, third, fourth, and every ſuperior degree, every man has many couples of anceſtors, increaſing according to the diſtances in a geometrical progreſſion upwards [k], the deſcendants of all which reſpective couples are (repreſentatively) related to him in the ſame degree. Thus in the ſecond degree, the iſſue of George and Cecilia Stiles and of Andrew and Eſther Baker,

[k] See pag. 204.

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mother marries again and has a child by her ſecond huſband; if this child could inherit from it's half brother, it would acquire the eſtate of the firſt huſband, to whom it is not related by blood; and in order to avoid this inconvenience, the half blood is univerſally excluded. But ſurely nothing can be more cruel or contrary to our notions of propriety and conſiſtency, than to give the eſtate to a diſtant relation or to the lord, in preference to a half brother, either when it has deſcended from the common parent, or when the half brother has himſelf acquired it.

A caſe was determined in the common pleas, a few years ago, under the following circumſtances: A father died inteſtate leaving two daughters by his firſt wife, and his ſecond wife pregnant, who was delivered of a ſon; this infant lived only a few weeks; and it was held, that as the mother had reſided upon one of the father's eſtates, and had received rent for others after the father's death, ſhe being the guardian in ſocage of the infant, this amounted to a legal ſeiſin in him, and of conſequence his two ſiſters could not inherit, but the eſtate deſcended perhaps to a remote relation. 3 *Wilſ.* 516. It is ſtrange, that the diſcuſſion of that caſe did not procure a repeal of this law, which, the Editor cannot but think, is now totally inconſiſtent with the ſpirit and equity of our ſyſtem of juriſprudence.

the two grandſires and grandmothers of John Stiles, are each in the ſame degree of propinquity; in the third degree, the reſpective iſſues of Walter and Chriſtian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themſelves the next kindred of the whole blood to John Stiles. To which therefore of theſe anceſtors muſt we firſt reſort, in order to find out deſcendants to be preferably called to the inheritance? In anſwer to this, and likewiſe to avoid all other confuſion and uncertainty that might ariſe between the ſeveral ſtocks wherein the purchaſing anceſtor may be ſought for, another qualification is requiſite, beſides the *proximity* and *entirety*, which is that of *dignity* or *worthineſs*, of blood. For,

VII. THE ſeventh and laſt rule or canon is, that in collateral inheritances the male ſtocks ſhall be preferred to the female; (that is, kindred derived from the blood of the male anceſtors, however remote, ſhall be admitted before thoſe from the blood of the female, however near,)—unleſs where the lands have, in fact, deſcended from a female.

THUS the relations on the father's ſide are admitted *in infinitum*, before thoſe on the mother's ſide are admitted at all[l]; and the relations of the father's father, before thoſe of the father's mother; and ſo on. And in this the Engliſh law is not ſingular, but warranted by the examples of the Hebrew and Athenian laws, as ſtated by Selden[m], and Petit[n]; though among the Greeks in the time of Heſiod[o], when a man died without wife or children, all his kindred (without any diſtinction) divided his eſtate among them. It is likewiſe warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Juſtinian[p] aboliſhed all diſtinction between them. It is alſo con- [225]

l Litt. § 4.
m *de ſucc. Ebraeor.* c. 12.
n *LL. Attic.* l. 1. t. 6.
o Θεογον. 606.
p *Nov.* 118.

formable

formable to the cuſtomary law of Normandy [q], which indeed in moſt reſpects agrees with our Engliſh law of inheritance.

HOWEVER, I am inclined to think, that this rule of our laws does not owe it's immediate original to any view of conformity to thoſe which I have juſt now mentioned; but was eſtabliſhed in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir muſt be of the blood of the firſt purchaſor. For, when ſuch firſt purchaſor was not eaſily to be diſcovered after a long courſe of deſcents, the lawyers not only endeavoured to inveſtigate him by taking the next relation of the whole blood to the perſon laſt in poſſeſſion, but alſo, conſidering that a preference had been given to males (by virtue of the ſecond canon) through the whole courſe of lineal deſcent from the firſt purchaſor to the preſent time, they judged it more likely that the lands ſhould have deſcended to the laſt tenant from his male than from his female anceſtors; from the father (for inſtance) rather than from the mother; from the father's father, rather than from the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expreſſion) through the male line; and gave it to the next relations on the ſide of the father, the father's father, and ſo upwards; imagining with reaſon that this was the moſt probable way of continuing it in the line of the firſt purchaſor. A conduct much more rational than the preference of the *agnati*, by the Roman laws: which, as they gave no advantage to the males in the firſt inſtance or direct lineal ſucceſſion, had no reaſon for preferring them in the tranſverſe collateral one: upon which account this preference was very wiſely aboliſhed by Juſtinian.

[236] THAT this was the true foundation of the preference of the *agnati* or male ſtocks, in our law, will farther appear, if we conſider, that, whenever the lands have notoriouſly deſcended to a man from his mother's ſide, this rule is totally reverſed;

[q] *Gr. Couſtum.* c. 25.

and

and no relation of his by the father's ſide, as ſuch, can ever be admitted to them: becauſe he cannot poſſibly be of the blood of the firſt purchaſor. And ſo, *e converſo*, if the lands deſcended from the father's ſide, no relation of the mother, as ſuch, ſhall ever inherit. So alſo, if they in fact deſcended to John Stiles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but alſo of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have deſcended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but alſo of Luke Kempe the father of Cecilia, is excluded. Whereas when the ſide from which they deſcended is forgotten, or never known, (as in the caſe of an eſtate newly purchaſed to be holden *ut feudum antiquum*) here the right of inheritance firſt runs up all the father's ſide, with a preference to the male ſtocks in every inſtance; and, if it finds no heirs there, it then, and then only, reſorts to the mother's ſide; leaving no place untried, in order to find heirs that may by poſſibility be derived from the original purchaſor. The greateſt probability of finding ſuch was among thoſe deſcended from the male anceſtors; but, upon failure of iſſue there, they may poſſibly be found among thoſe derived from the females.

THIS I take to be the true reaſon of the conſtant preference of the agnatic ſucceſſion, or iſſue derived from the male anceſtors, through all the ſtages of collateral inheritance; as the ability for perſonal ſervice was the reaſon for preferring the males at firſt in the direct lineal ſucceſſion. We ſee clearly, that, if males had been perpetually admitted, in utter excluſion of females, the tracing the inheritance back through the male line of anceſtors muſt at laſt have inevitably brought us up to the firſt purchaſor: but, as males have not been *perpetually admitted*, but only *generally preferred*; as females have [237]
not been *utterly excluded*, but only *generally poſtponed* to males; the tracing the inheritance up through the male ſtocks will not give us abſolute demonſtration, but only a ſtrong probability, of arriving at the firſt purchaſor; which, joined with

the other probability, of the wholeneſs or entirety of blood, will fall little ſhort of a certainty.

BEFORE we conclude this branch of our enquiries, it may not be amiſs to exemplify theſe rules by a ſhort ſketch of the manner in which we muſt ſearch for the heir of a perſon, as *John Stiles*, who dies ſeiſed of land which he acquired, and which therefore he held as a feud of indefinite antiquity [r].

IN the firſt place ſucceeds the eldeſt ſon, Matthew Stiles, or his iſſue: (n° 1.)—if his line be extinct, then Gilbert Stiles and the other ſons, reſpectively, in order of birth, or their iſſue; (n° 2.)—in default of theſe, all the daughters together, Margaret and Charlotte Stiles, or their iſſue. (n° 3.)—On failure of the deſcendants of *John Stiles* himſelf, the iſſue of Geoffrey and Lucy Stiles, his parents, is called in: *viz.* firſt, Francis Stiles, the eldeſt brother of the whole blood, or his iſſue:—(n° 4.)—then Oliver Stiles, and the other whole brothers, reſpectively, in order of birth, or their iſſue; (n° 5.)—then the ſiſters of the whole blood all together, Bridget and Alice Stiles, or their iſſue. (n° 6.)—In defect of theſe, the iſſue of George and Cecilia Stiles, his father's parents; reſpect being ſtill had to their age and ſex: (n° 7.)—then the iſſue of Walter and Chriſtian Stiles, the parents of his paternal grandfather: (n° 8.)—then the iſſue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (n° 9.)—and ſo on in the paternal grandfathers paternal line, or blood of Walter Stiles, *in infinitum.* In defect of theſe, the iſſue of William and Jane Smith, the parents of his paternal grandfather's mother: (n° 10.)—and ſo on in the paternal grandfather's maternal line, or blood of
[238] Chriſtian Smith, *in infinitum*; till both the immediate bloods of George Stiles, the paternal grandfather, are ſpent.—Then we muſt reſort to the iſſue of Luke and Frances Kempe, the parents of *John Stiles*'s paternal grandmother: (n° 11.)—then to the iſſue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (n° 12.)—and ſo on in the

r See the table of deſcents annexed.

paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum* —In default of which, we muſt call in the iſſue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (n° 13.) – and ſo on in the paternal grandmother's maternal line, or blood of Frances Holland, *in infinitum;* till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are alſo ſpent.—Whereby the paternal blood of *John Stiles* entirely failing, recourſe muſt then, and not before, be had to his maternal relations; or the blood of the Bakers, (n° 14, 15, 16.) Willis's, (n° 17.) Thorpes, (n° 18, 19.) and Whites; (n° 20.) in the ſame regular ſucceſſive order as in the paternal line.

THE ſtudent ſhould however be informed, that the claſs, n° 10, would be poſtponed to n° 11, in conſequence of the doctrine laid down, *arguendo*, by juſtice Manwoode, in the caſe of Clere and Brooke[s]; from whence it is adopted by lord Bacon[t], and ſir Matthew Hale[u]: becauſe, it is ſaid, that all the female anceſtors on the part of the father are equally worthy of blood; and, in that caſe, proximity ſhall prevail. And yet, notwithſtanding theſe reſpectable authorities, the compiler of this table hath ventured (in point of theory, for the caſe never yet occurred in practice) to give the preference to n° 10 before n° 11; for the following reaſons: 1. Becauſe this point was not the principal queſtion in the caſe of Clere and Brooke: but the law concerning it is delivered *obiter* only, and in the courſe of argument, by juſtice Manwoode; though afterwards ſaid to be confirmed by the three other juſtices in ſeparate, extrajudicial, conferences with the reporter. 2. Becauſe the chief-juſtice, ſir James Dyer, in reporting the reſolution of the court in what ſeems to be the ſame caſe[w], takes no notice of this doctrine. 3. Becauſe it appears from Plowden's report, that very many gentlemen of the law were diſſatisfied with this poſition of juſtice Manwoode; ſince the blood of n° 10 was derived to the purchaſor through a greater number of males than the blood of n° 11, and was therefore in their opinion the more worthy of the two.

[s] Plowd. 450.
[t] Elem. c. 1.
[u] H. C. L. 240. 244.
[w] Dyer. 314.

4. Becaufe the pofition itfelf deftroys the otherwife entire and regular fymmetry of our legal courfe of defcents, as is manifeft by infpecting the table; wherein n° 16, which is analogous in the maternal line to n° 10 in the paternal, is preferred to n° 18, which is analogous to n° 11, upon the authority of the eighth rule laid down by Hale himfelf: and it deftroys alfo that conftant preference of the male ftocks in the law of inheritance, for which an additional reafon is before [x] given, befides the mere dignity of blood. 5. Becaufe it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author [y]; and eftablifhes a collateral doctrine, (*viz.* the preference of n° 11 to n° 10) feemingly, though perhaps not ftrictly, incompatible with the principal point refolved in the cafe of Clere and Brooke, *viz.* the preference of n° 11 to n° 14. And, though that learned writer propofes to refcind the principal point then refolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet refolved at all. 6. Becaufe the reafon that is given for this doctrine, by lord Bacon, (*viz.* that in any degree, paramount the firft, the law refpecteth proximity, and not dignity of blood) is directly contrary to many inftances given by Plowden and Hale, and every other writer on the law of defcents. 7. Becaufe this pofition feems to contradict the allowed doctrine of fir Edward Coke [z]; who lays it down (under different names) that the blood of the Kempes (*alias* Sandies) fhall not inherit till the blood of the Stiles's (*alias* Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both n° 9 and n° 10 are extinct. Wherefore n° 11 (being the blood of the Kempes) ought not to inherit till then. 8. Becaufe in the cafe, Mich. 12 Edw. IV. 14 [a]. (much relied on in that of Clere and Brooke) it is laid down as a rule, that "*ceftuy, que doit* "*inheriter al pere, doit inheriter al fits* [b]." And fo fir Matthew Hale [c] fays, "that though the law excludes the father

x Pag. 235, 6, 7.

y Law of inheritances. 2d edit. pag. 30. 38. 61, 62. 66.

z Co. Litt. 12. Hawk. abr. *in loc.*

a Fitzh. *Abr. tit. difcent.* 2. Bro. *Abr. t. difcent.* 3.

b See pag. 223.

c Hift. C. L. 243.

"from

"from inheriting, yet it fubftitutes and directs the defcent, "as it fhould have been, had the father inherited." Now it is fettled, by the refolution in Clere and Brooke, that n° 10 fhould have inherited before n° 11 to Geoffrey Stiles, the father, [240] had he been the perfon laft feifed; and therefore n° 10 ought alfo to be preferred in inheriting to *John Stiles*, the fon.

IN cafe *John Stiles* was not himfelf the purchafor, but the eftate in fact came to him by defcent from his father, mother, or any higher anceftor, there is this difference; that the blood of that line of anceftors, from which it did not defcend, can never inherit: as was formerly fully explained [d]. And the like rule, as is there exemplified, will hold upon defcents from any other anceftors.

THE ftudent fhould alfo bear in mind, that, during this whole procefs, *John Stiles* is the perfon fuppofed to have been laft actually feifed of the eftate. For if ever it comes to veft in any other perfon, as heir to *John Stiles*, a new order of fucceffion muft be obferved upon the death of fuch heir; fince he, by his own feifin, now becomes himfelf an anceftor or *ftipes*, and muft be put in the place of *John Stiles*. The figures therefore denote the order, in which the feveral claffes would fucceed to *John Stiles*, and not to each other: and before we fearch for an heir in any of the higher figures, (as n° 8.) we muft be firft affured that all the lower claffes (from n° 1 to n° 7.) were extinct, at *John Stiles*'s deceafe (17).

[d] See page 236.

(17) Some profeffional gentlemen have not been fatisfied with the learned Judge's arguments for his preference of n° 10 to n° 11; and an ingenious and able defence of the contrary doctrine has been publifhed in anfwer to the learned Commentator by Mr. Ofgood. The late learned Vinerian Profeffor has alfo declared, that he can "by no means accede to this opinion of Sir "William Blackftone." 2 *Woodd.* 262. But from the confideration which I have beftowed upon the fubject, I entirely concur with the learned Judge in giving a preference to n° 10 be-

fore n° 11. I am ready to admit, that ſome of the reaſons adduced to maintain this doctrine, cannot be ſupported; but it does not follow that a doctrine is erroneous, becauſe, out of a number of arguments in its favour, ſome of them are not unanſwerable. But the principal grounds, which the Editor relies upon, are the following, *viz.* that the rule laid down by the learned Judge, is part of a conſiſtent and certain ſyſtem, by which we can immediately diſcover the heir to any inheritance; if we deviate from it, we are ſoon bewildered amidſt uncertainty, inconſiſtency, and confuſion; and when the law of deſcents is not called in to make a proviſion for a man's family and his near relations, in which both our reaſon and feelings, however we may wiſh to divide the inheritance into different portions, correſpond with the law, it is then entirely *juris poſitivi*, and its only object is certainty, by which anxiety and litigation among a number of claimants of an inteſtate's eſtate, may be ſuppreſſed. But the law of deſcents is eſtabliſhed beyond all poſſibility of controverſy, till we ſearch for an heir among great uncles, and ſecond and third couſins. And between theſe, and ſtill more remote relations, it is of infinitely greater concern to the public to fix a rule, which can inſtantly inform us who is the heir, than to attend to any petty conſiderations of propriety, who ought to be the heir. It is fully ſettled, in the caſe of Clere and Brooke, *Plowd.* 450. that the brother of a grandmother, or his repreſentative, ſhall be preferred in the deſcent of a newly-purchaſed eſtate to a brother of a mother, or his repreſentative; and this is a law which is certainly contrary to our natural wiſhes and ſentiments; but it does little violence to our feelings to poſtpone the brother of a grandmother to the brother of a great-grandmother, and ſo in ſucceſſion. If the grandmother is more worthy than the mother, becauſe related by one male blood, and the mother by none, the great-grandmother, as is well obſerved by the editor of Plowden, ought to be ſtill more worthy, being related by two male bloods. And whatever may be the principle, which operates ſo powerfully as to carry the eſtate paſt the mother to the grandmother, ought to preſerve its conſiſtency, and to carry it alſo from the grandmother to the great-grandmother. But certainty is of much greater importance than conſiſtency and ſymmetry; and if we have no other rule among heirs through females beyond the mother than proximity, what have we to aſſiſt and guide us, when there are deſcendants of a number of female anceſtors, or of anceſtors through females of equal proximity? For if 10 is not to be preferred

to

to 11, what principle can we find to determine between 10, 12, and 13? They have all an equal claim by proximity. The ſupporters of proximity will not be ſo bold as to ſay that they ſhall be coparcenors, or that they ſhall run a race, and one ſhall gain the eſtate by occupancy. If we go a ſtep higher, we ſhall find the deſcendants of the brothers of Anne Godfrey, William Smith, Jane King, Thomas Kempe, Sarah Browne, Charles Holland, and Mary Wilſon, have all the ſame pretenſions; and we may eaſily ſuppoſe alſo 15, 31, or any other number of claimants, without any clue whatever to determine the priority of their proximity. But according to the rule laid down by the learned Judge, no two caſes can poſſibly be produced, but we can determine inſtantly which has the prior right by deſcent. Moreover a *feudum novum* is conſidered as a *feudum antiquum*, or a feud of indefinite antiquity; and if it had actually deſcended, which we may ſuppoſe, from Walter or George Stiles, then the heirs by their wives, and the wives of their deſcendants, would all have been entirely cut off; and therefore it is not unreaſonable, or, at leaſt, inconſiſtent with that ſuppoſition, that an heir on the part of a wife of a more remote anceſtor of the Stileſes, ſhould be preferred to the heir on the part of a wife of a nearer anceſtor.

If then the plan of deſcents laid down by the learned Judge be eſtabliſhed, it may be explained by the ſcheme ſubjoined, which will determine the heir at law in all caſes that can poſſibly be put or deviſed.

In tracing the heir downwards, in the deſcending line, no difficulty can ever occur. But in the ſcheme annexed, I ſuppoſe the propoſitus to die without iſſue, and without brothers or ſiſters, ſeized of an eſtate by purchaſe; and I ſuppoſe A, B, C, D, &c. to Z, to be his father, grandfather, &c. his lineal anceſtors of the ſame name; and a, b, c, d,—z, to be their wives reſpectively, who are not neceſſarily related to each other. To find then the heir of the propoſitus, we muſt inquire for the lineal heir or repreſentative of the eldeſt brother of A the father; then for the repreſentative of the ſecond, third, &c. but if A had no brothers, then for his ſiſters and their repreſentatives; if none can be found, we muſt in like manner have recourſe to B, and ſo on to C; and if we find a repreſentative of III, the eldeſt brother of C, he is the heir at law to the inteſtate, and will inherit before the repreſentatives of the brothers of D, E, F, &c. And thus we are to go back through the lineal male anceſtors of the inteſtate; but if in going up to Z, or to any indefinite diſtance, we can find no heir iſſuing

issuing from the male ancestors, we must then have recourse to the females; but in this research, we must begin at the other end, and pursue a different direction. We must inquire first, whether z, the wife of one of the remotest male ancestors of the propositus, had a brother or sister leaving a representative; for if so, he will be the heir of the propositus; if we suppose 24, 6, 3, to be the respective brothers of the wives, then the descendants of 24 will inherit before those of 6; and for the same reason, those of 6 before these of 3. If z had no brother or sister leaving issue, but has collateral relations descended from her ancestors, one of those must be preferred to any heir on the part of f, e, d, &c. and to discover such an heir of z, we must put z in the place of the propositus, and inquire for the representative of the brothers and sisters of her male ancestors, and then of their wives as before, and such an heir of z will inherit before the heir of d, e, b, and a; and for the same reason their heirs respectively will have a preference as we come down to a. This table, the Editor conceives, is not difficult to be comprehended, and will determine immediately the priority of relations ever so remote, if their pedigrees can be traced.

It must be remembered, that if it is known that the estate has descended from E to the propositus, then none of the heirs of e, d, c, b, a, can ever be admitted; and if it has descended from one of the wives, *viz.* f, then, as before, the heirs of e, d, c, b, a, are excluded, and also the collaterals of the male ancestors above E; and if no collateral of E, D, &c. f's descendants can be found, then to find her heir, she must be put in the place of the propositus in the table. The student must also observe, that if an estate, of which the propositus is the purchasor, should descend to a representative of a brother of C from the propositus, upon failure of that branch, it may afterwards pass to a representative of a brother of F, and so upwards in the male line; but being once in the line of VI, the female branches, f, e, d, &c. are cut off, for they are not related by blood to F; but, upon failure of that line, it is still transmissible to the lines of the females above; for their collaterals would be related by blood, or will have a common ancestor with F; and this is another strong argument in support of the doctrine, that the remoter females should be preferred to the nearer; for this may be presumed to have been the progress of the estate in its descent from the propositus. When also it passes from the male into any female line, it cannot afterwards pass into any other female line, for they are not related to each other by blood. See n. 9. p. 220.

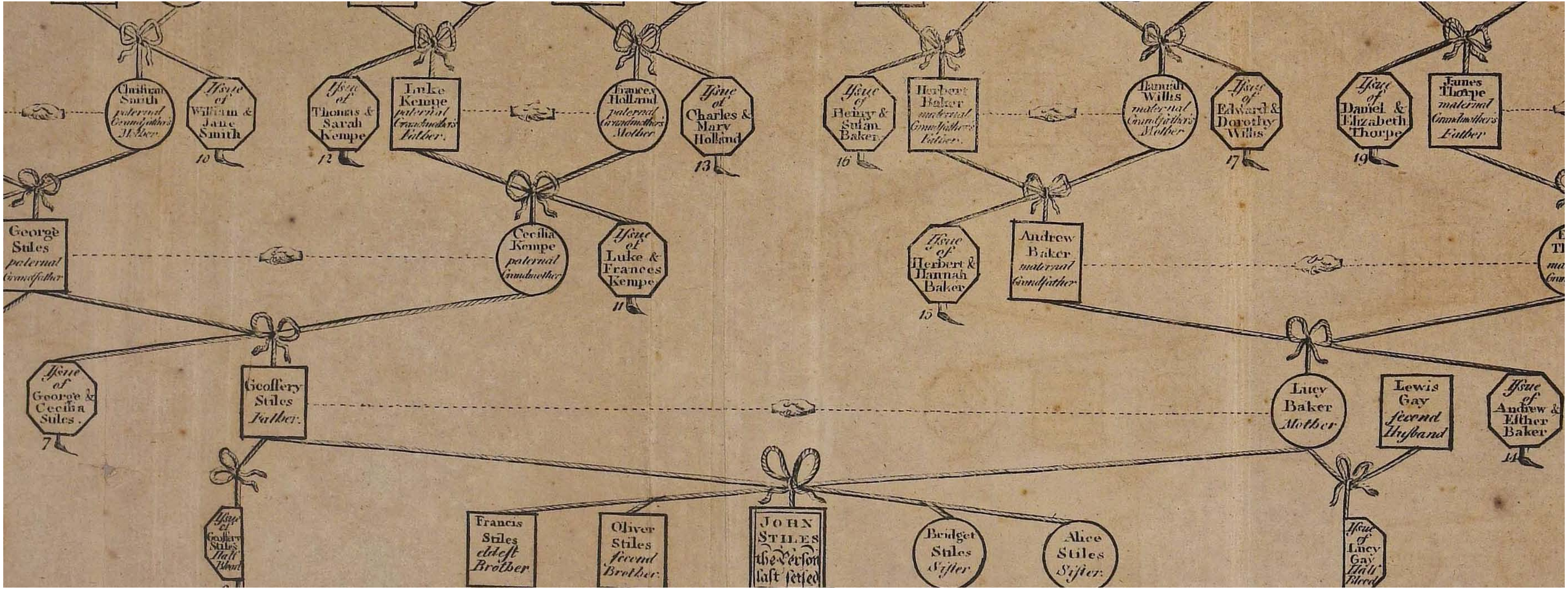
Christian Smith paternal Grandfather's Mother
Issue of William & Jane Smith
10
Issue of Thomas & Sarah Kempe
12
Luke Kempe paternal Grandmother's Father
Frances Holland paternal Grandmother's Mother
Issue of Charles & Mary Holland
13
Issue of Henry & Susan Baker
16
Herbert Baker maternal Grandfather's Father
Hannah Willis maternal Grandfather's Mother
Issue of Edward & Dorothy Willis
17
Issue of Daniel & Elizabeth Thorpe
19
James Thorpe maternal Grandmother's Father
George Stiles paternal Grandfather
Cecilia Kempe paternal Grandmother
Issue of Luke & Frances Kempe
11
Issue of Herbert & Hannah Baker
15
Andrew Baker maternal Grandfather
Issue of George & Cecilia Stiles.
7
Geoffery Stiles Father
Lucy Baker Mother
Lewis Gay second Husband
Issue of Andrew & Esther Baker
14
Issue of Geoffery Stiles Half Blood
Francis Stiles eldest Brother
Oliver Stiles second Brother
JOHN STILES the Person last seised
Bridget Stiles Sister
Alice Stiles Sister
Issue of Lucy Gay Half Blood

TABLE *of* DESCENTS.

Brothers or Sisters.	Male Line.	Their Wives.	Brothers or Sisters.
	Z	z	24
	.	.	
	.	.	
	.	.	
	.	.	
VI	F	f	6
	E	e	
	D	d	
III	C	c	3
	B	b	
	A	a	

Propositus
and
First Purchasor.

CHAPTER THE FIFTEENTH.

OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT.

PURCHASE, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton [a]; the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law [b].

PURCHASE, indeed, in it's vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I *give* land freely to another, he is in the eye of the law a purchasor [c]; and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchasor; for he takes quite another estate than the law of descents would have given him. Nay even if the ancestor devises his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase [d] (1). But if a

[a] § 12.
[b] Co. Litt. 18.
[c] *Ibid.*
[d] Lord Raym. 728.

(1) A man having two daughters his heirs, devises his lands to them and their heirs, and dies. They shall take by purchase as joint-

man, ſeiſed in fee, deviſes his whole eſtate to his heir at law, ſo that the heir takes neither a greater nor a leſs eſtate by the deviſe than he would have done without it, he ſhall be adjudged to take by deſcent [e], even though it be charged with incumbrances [f]; this being for the benefit of creditors, and others, who have demands on the eſtate of the anceſtor. If a remainder be limited to the heirs of Sempronius, here Sempronius himſelf takes nothing; but if he dies during the continuance of the particular eſtate, his heirs ſhall take as purchaſors [g]. But, if an eſtate be made to A for life, remainder to his right heirs in fee, his heirs ſhall take by deſcent: for it is an ancient rule of law, that wherever the anceſtor takes an eſtate for life, the heir cannot by the ſame conveyance take an eſtate in fee by *purchaſe*, but only by *deſcent* [h]. And, if A dies before entry, ſtill his heir ſhall take by deſcent, and not by purchaſe; for, where the heir takes any thing that might have veſted in the anceſtor, he takes by way of deſcent [i]. The anceſtor, during his life, beareth in himſelf all his heirs [k]; and therefore, when once he is or might have been ſeiſed of the lands, the inheritance ſo limited to his heirs veſts in the anceſtor himſelf: and the word "heirs" in this caſe is not eſteemed a word of *purchaſe*, but a word of *limitation*, enuring ſo as to increaſe the eſtate of the anceſtor from a tenancy for life to a fee-ſimple (2). And, had it been otherwiſe, had the heir (who is uncertain till the death of the anceſtor) been allowed to take as a purchaſor originally nominated in the deed, as muſt have been the caſe if the remainder had been expreſsly limited to Matthew or Thomas by name; then, in the times of ſtrict feodal tenure, the lord would

e 1 Roll. Abr. 626.
f Salk. 241. Lord Raym. 728.
g 1 Roll. Abr. 627.
h 1 Rep. 104. 2 Lev. 60. Raym. 334.
i 1 Rep. 98.
k Co. Litt. 22.

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joint-tenants: for the eſtate of joint-tenants, and tenants in common, is different in its nature and quality from that of coparcenors. *Cro. Eliz.* 431.

(2) See *ante*, p. 172. n. 3.

have

have been defrauded by ſuch a limitation of the fruits of his ſigniory, ariſing from a deſcent to the heir.

WHAT we call *purchaſe, perquiſitio,* the feudiſts called *conqueſt, conquaeſtus,* or *conquiſitio*[l]: both denoting any means of acquiring an eſtate out of the common courſe of inheritance. And this is ſtill the proper phraſe in the law of Scotland[m]: as it was among the Norman juriſts, who ſtiled
[243] the firſt purchaſor (that is, he who brought the eſtate into the family which at preſent owns it) the conqueror or *conquereur*[n]. Which ſeems to be all that was meant by the appellation which was given to William the Norman, when his manner of aſcending the throne of England was, in his own and his ſucceſſors' charters, and by the hiſtorians of the times, entitled *conquaeſtus,* and himſelf *conquaeſtor* or *conquiſitor*[o]; ſignifying that he was the firſt of his family who acquired the crown of England, and from whom therefore all future claims by deſcent muſt be derived: though now, from our diſuſe of the feodal ſenſe of the word, together with the reflexion on his forcible method of acquiſition, we are apt to annex the idea of *victory* to this name of *conqueſt* or *conquiſition:* a title which, however juſt with regard to the *crown,* the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had[p].

THE difference in effect, between the acquiſition of an eſtate by deſcent and by purchaſe, conſiſts principally in theſe two points: 1. That by purchaſe the eſtate acquires a new inheritable quality, and is deſcendible to the owner's blood in general, and not the blood only of ſome particular anceſtor. For, when a man takes an eſtate by purchaſe, he takes it not *ut feudum paternum* or *maternum,* which would deſcend only to the heirs by the father's or the mother's ſide: but he takes it *ut feudum antiquum,* as a feud of indefinite antiquity; whereby it becomes inheritable to his heirs gene-

l Crag. *l.* 1. *t.* 10. § 18.
m Dalrymple of feuds. 210.
n *Gr. Couſtum. Gl.ſſ. c.* 25. *pag.* 40.
o Spelm. *Gloſſ.* 145.
p See book I. ch. 3.

ral,

ral, first of the paternal, and then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For, if the ancestor by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him [q]) had any estate of inheritance vested in him by descent from (or any estate *pur auter vie* coming to him by special occupancy, as heir to [r]) that ancestor, sufficient to answer [244] the charge[s]; whether he remains in possession, or hath aliened it before action brought [t]; which sufficient estate is in the law called *assets*; from the French word, *assez*, enough [u]. Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent [v].

THIS is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

I. ESCHEAT, we may remember [w], was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman [x], in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee [y].

q Stat. 29 Car. II. c. 3. § 10.
r *Ibid.* § 12.
s 1 P. Wms. 777.
t Stat. 3 & 4 W. & M. c. 14.
u Finch. law. 119.
v Finch. Rep. 86.
w See pag. 72.
x *Eschet* or *echet*, formed from the verb *eschoir* or *echoir*, to happen.
y 1 *Feud.* 86. Co. Litt. 13.

ESCHEAT

ESCHEAT therefore being a title frequently veſted in the lord by inheritance, as being the fruit of a ſigniory to which he was entitled by deſcent, (for which reaſon the lands eſcheating ſhall attend the ſigniory, and be inheritable by ſuch only of his heirs as are capable of inheriting the other [z]) it may ſeem in ſuch caſes to fall more properly under the former general head of acquiring title to eſtates, *viz.* by deſcent, (being veſted in him by act of law, and not by his own act [245] or agreement) than under the preſent by purchaſe. But it muſt be remembered that, in order to complete this title by eſcheat, it is neceſſary that the lord perform an act of his own, by *entering* on the lands and tenements ſo eſcheated, or ſuing out a *writ of eſcheat* [a] : on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a ſtranger who uſurps the poſſeſſion, his title by eſcheat is barred [b]. It is therefore in ſome reſpect a title acquired by his own act, as well as by act of law. Indeed this may alſo be ſaid of deſcents themſelves, in which an entry or other ſeiſin is required, in order to make a complete title; and therefore this diſtribution of titles by our legal writers, into thoſe by deſcent and by purchaſe, ſeems in this reſpect rather inaccurate, and not marked with ſufficient preciſion: for, as eſcheats muſt follow the nature of the ſigniory to which they belong, they may veſt by either purchaſe or deſcent, according as the ſigniory is veſted. And, though ſir Edward Coke conſiders the lord by eſcheat as in ſome reſpects the aſſignee of the laſt tenant [c], and therefore taking by purchaſe; yet, on the other hand, the lord is more frequently conſidered as being *ultimus haeres*, and therefore taking by deſcent in a kind of caducary ſucceſſion.

THE law of eſcheats is founded upon this ſingle principle, that the blood of the perſon laſt ſeiſed in fee-ſimple is, by ſome means or other, utterly extinct and gone: and, ſince none can inherit his eſtate but ſuch as are of his blood and

[z] Co. Litt. 13.

[a] Bro. *Abr. tit. eſcheat.* 26.

[b] *Ibid. tit. acceptance.* 25. Co. Litt. 268.

[c] 1 Inſt. 215.

consanguinity,

consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feodal writers denominate *feudum apertum;* and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

ESCHEATS are frequently divided into those *propter defectum sanguinis* and those *propter delictum tenentis:* the one sort, if the tenant dies without heirs; the other, if his blood be attainted [d]. But both these species may well be comprehended under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta [e], "*dominus capitalis feodi loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.*" [246]

ESCHEATS therefore arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

1, 2, 3. THE first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors: secondly, when he dies without any relations on the part of those ancestors from whom his estate descended: thirdly, when he dies without any relations of the whole blood. In two of these cases the blood of the first purchasor is certainly, in the other it is probably, at an end; and therefore in all of them the law directs, that the land shall escheat to the lord of the fee: for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacit-

d Co. Litt. 13. 92.

e *l.* 6. *c.* 1.

ly

ly annexed to all feuds, any perſon ſhould be ſuffered to ſucceed to the lands, who is not of the blood of the firſt feudatory, to whom for his perſonal merit the eſtate is ſuppoſed to have been granted (3).

4. A MONSTER, which hath not the ſhape of mankind, but in any part evidently bears the reſemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of it's body, yet if it
[247] hath human ſhape, it may be heir [f]. This is a very antient rule in the law of England [g]; and it's reaſon is too obvious, and too ſhocking, to bear a minute diſcuſſion. The Roman law agrees with our own in excluding ſuch births from ſucceſſions [h]: yet accounts them, however, children in ſome reſpects, where the parents, or at leaſt the father, could reap any advantage thereby [i]: (as the *jus trium liberorum*, and the like) eſteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be ſuch an iſſue, as ſhall entitle the huſband to be tenant by the curteſy [k]; becauſe it is not capable of inheriting. And therefore, if there appears no other heir than ſuch a prodigious birth, the land ſhall eſcheat to the lord.

[f] Co. Litt. 7, 8.

[g] *Qui contra formam humani generis converſo more procreantur, ut ſi mulier monſtroſum vel prodigioſum enixa ſit, inter libros non computentur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut ſi ſex vel tantum quatuor digitos habuerit, bene debet inter liberos connumerari: et, ſi membra ſint inutilia aut tortuoſa, non tamen eſt partus monſtroſus.* Bract. *l.* 1. *c.* 6. & *l.* 5. *tr.* 5. *c.* 30.

[h] *Ff.* 1. 5. 14.

[i] *Ff.* 50. 16. 135. Paul. 4. *ſent.* 9. § 63.

[k] Co. Litt. 29.

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(3) In the great caſe of Burgeſs *v.* Wheate, lord chancellor Northington determined contrary to the learned opinions of lord Mansfield and of Sir Thomas Clarke maſter of the rolls, whoſe aſſiſtance he had requeſted, that where a *ceſtui que truſt* dies without heirs, the truſt does not eſcheat to the crown, ſo that the lands may be recovered in a court of equity by the king, but that the truſtee ſhall hold them for his own benefit. 1 *Bl. Rep.* 123.

5. BASTARDS are incapable of being heirs. Baſtards, by our law, are ſuch children as are not born either in lawful wedlock, or within a competent time after it's determination [l]. Such are held to be *nullius filii*, the ſons of nobody; for the maxim of law is, *qui ex damnato coitu naſcuntur, inter liberos non computantur* [m]. Being thus the ſons of nobody, they have no blood in them, at leaſt no inheritable blood; conſequently, none of the blood of the firſt purchaſor: and therefore, if there be no other claimant than ſuch illegitimate children, the land ſhall eſcheat to the lord [n]. The civil law differs from ours in this point, and allows a baſtard to ſucceed to an inheritance, if after it's birth the mother was married to the father [o]: and alſo, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet ſhe and her baſtard ſon were admitted each to one twelfth of the inheritance [p]: and a baſtard was likewiſe [248] capable of ſucceeding to the whole of his mother's eſtate, although ſhe was never married; the mother being ſufficiently certain, though the father is not [q]. But our law, in favour of marriage, is much leſs indulgent to baſtards.

THERE is indeed one inſtance, in which our law has ſhewn them ſome little regard; and that is uſually termed the caſe of *baſtard eignè* and *mulier puiſnè*. This happens when a man has a baſtard ſon, and afterwards marries the mother, and by her has a legitimate ſon, who in the language of the law is called a *mulier*, or, as Glanvil [r] expreſſes it in his Latin, *filius mulieratus;* the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldeſt ſon is baſtard, or *baſtard eignè;* and the younger ſon is legitimate, or *mulier puiſnè*. If then the father dies, and the *baſtard eignè* enters upon his land, and enjoys it to his death, and dies ſeiſed thereof, whereby the inheritance deſcends to his iſſue; in this caſe the *mulier puiſnè*, and all other heirs, (though minors, feme coverts, or under any incapacity what-

l See book I. ch. 16.
m Co. Litt. 8.
n Finch. law. 117.
o *Nov.* 89. *c.* 8.
p *Ibid. c.* 12.
q *Cod.* 6. 57. 5.
r *l.* 7. *c.* 1.

ſoever) are totally barred of their right[s]. And this, 1. As a puniſhment on the *mulier* for his negligence, in not entering during the *baſtard*'s life, and evicting him. 2. Becauſe the law will not ſuffer a man to be baſtardized after his death, who entered as heir and died ſeiſed, and ſo paſſed for legitimate in his lifetime. 3. Becauſe the canon law (following the civil) did allow ſuch *baſtard eignè* to be legitimate, on the ſubſequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid ſuch a regard to a perſon thus peculiarly circumſtanced, that, after the land had deſcended to his iſſue, they would not unravel the matter again, and ſuffer his eſtate to be ſhaken. But this indulgence was ſhewn to no other kind of baſtard; for, if the mother was never married to the father, ſuch baſtard could have no colourable title at all[t].

[249] As baſtards cannot be heirs themſelves, ſo neither can they have any heirs but thoſe of their own bodies. For, as all collateral kindred conſiſts in being derived from the ſame common anceſtor, and as a baſtard has no legal anceſtors, he can have no collateral kindred; and, conſequently, can have no legal heirs, but ſuch as claim by a lineal deſcent from himſelf And therefore if a baſtard purchaſes land and dies ſeiſed thereof without iſſue, and inteſtate, the land ſhall eſcheat to the lord of the fee[u].

6. ALIENS[v] alſo are incapable of taking by deſcent, or inheriting[w]: for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reaſons ſtrictly feodal. Though, if lands had been ſuffered to fall into their hands who owe no allegiance to the crown of England, the deſign of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his lands ſhall eſcheat to the lord.

[s] Litt. § 399. Co. Litt. 244.
[t] Litt. § 400.
[u] Bract. *l.* 2. *c.* 7. Co. Litt. 244.
[v] See Book. I. ch. 10.
[w] Co. Litt 8.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase [x], they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden [y], because they have not in them any inheritable blood.

AND farther, if an alien be made a denizen by the king's letters patent, and then purchases lands, (which the law allows such a one to do) his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterwards, may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires [250] an hereditary quality, which will be transmitted to his subsequent posterity. Yet, if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not [z].

SIR Edward Coke [a] also holds, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common stock of their consanguinity, is the father; and as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the antient law; not only from the rule before cited [b], that *cestuy, que doit inheriter al pere, doit inheriter al fits;* but also because we have seen that the only feodal foundation, upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law,

x Co. Litt. 2.
y Ibid. 1 Lev. 59.
z Co. Litt. 129.
a 1 Inst. 8.
b See pag 223 and 239.

that it deſcended from ſome one of his anceſtors: but in this caſe as the immediate anceſtor was an alien, from whom it could by no poſſibility deſcend, this ſhould deſtroy the ſuppoſition, and impede the deſcent, and the land ſhould be inherited *ut feudum ſtricte novum;* that is, by none but the lineal deſcendants of the purchaſing brother; and on failure of them, ſhould eſcheat to the lord of the fee. But this opinion hath been ſince overruled [c]: and it is now held for law, that the ſons of an alien born here, may inherit to each other; the deſcent from one brother to another being an *immediate* deſcent [d]. And reaſonably enough upon the whole; for, as (in common purchaſes) the whole of the ſuppoſed deſcent from indefinite anceſtors is but fictitious, the law may as well ſuppoſe the requiſite anceſtor as ſuppoſe the requiſite deſcent.

[251] It is alſo enacted, by the ſtatute 11 & 12 W. III. c. 6. that all perſons, being natural-born ſubjects of the king, may inherit and make their titles by deſcent from any of their anceſtors lineal or collateral; although their father or mother, or other anceſtor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in caſe perſons ſhould thereby gain a future capacity to inherit, who did not exiſt at the death of the perſon laſt ſeiſed. As, if Francis the elder brother of John Stiles be an alien, and Oliver the younger be a natural-born ſubject, upon John's death without iſſue his lands will deſcend to Oliver the younger brother: now, if afterwards Francis has a child born in England, it was feared that, under the ſtatute of king William, this new-born child might defeat the eſtate of his uncle Oliver. Wherefore it is provided, by the ſtatute 25 Geo. II. c. 39. that no right of inheritance ſhall accrue by virtue of the former ſtatute to any perſons whatſoever, unleſs they are in being and capable to take as heirs at the death of the perſon laſt ſeiſed:—with an exception however

c 1 Ventr. 473. 1 Lev. 59. 1 Sid. 193.

d See pag. 226.

to the caſe, where lands ſhall deſcend to the daughter of an alien; which deſcent ſhall be diveſted in favour of an after-born brother, or the inheritance ſhall be divided with an after-born ſiſter or ſiſters, according to the uſual rule[d] of deſcents by the common law.

7. By attainder alſo, for treaſon or other felony, the blood of the perſon attainted is ſo corrupted, as to be rendered no longer inheritable.

Great care muſt be taken to diſtinguiſh between forfeiture of lands to the king, and this ſpecies of eſcheat to the lord; which, by reaſon of their ſimilitude in ſome circumſtances, and becauſe the crown is very frequently the immediate lord of the fee and therefore entitled to both, have been often confounded together. Forfeituee of lands, and of whatever elſe the offender poſſeſſed, was the doctrine of the [252]
old Saxon law[e], as a part of puniſhment for the offence; and does not at all relate to the feodal ſyſtem, nor is the conſequence of any ſigniory or lordſhip paramount[f]: but, being a prerogative veſted in the crown, was neither ſuperſeded nor diminiſhed by the introduction of the Norman tenures; a fruit and conſequence of which, eſcheat muſt undoubtedly be reckoned. Eſcheat therefore operates in ſubordination to this more antient and ſuperior law of forfeiture.

The doctrine of eſcheat upon attainder, taken ſingly, is this: that the blood of the tenant, by the commiſſion of any felony, (under which denomination all treaſons were formerly comprized[g]) is corrupted and ſtained, and the original donation of the feud is thereby determined, it being always granted to the vaſal on the implied condition of *dum bene ſe geſſerit*. Upon the thorough demonſtration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the eſtate inſtantly falls back from the offender to the lord of the fee, and the inheritable

d See pag. 208 and 214.

e *LL. Aelfred. c.* 4. *LL. Canut. c.* 54.

f 2 Inſt. 64. Salk. 85.

g 3 Inſt. 15. Stat. 25 Edw. III. c. 2. § 12.

quality of his blood is extinguiſhed and blotted out for ever. In this ſituation the law of feodal eſcheat was brought into England at the conqueſt; and in general ſuperadded to the antient law of forfeiture. In conſequence of which corruption and extinction of hereditary blood, the land of all felons would immediately reveſt in the lord, but that the ſuperior law of forfeiture intervenes, and intercepts it in it's paſſage: in caſe of treaſon, for ever; in caſe of other felony, for only a year and a day; after which time it goes to the lord in a regular courſe of eſcheat[h], as it would have done to the heir of the felon in caſe the feodal tenures had never been introduced. And that this is the true operation and genuine hiſtory of eſcheats will moſt evidently appear from this incident to gavelkind lands, (which ſeems to be the old Saxon tenure) that they are in no caſe ſubject to eſcheat for felony, though they are liable to forfeiture for treaſon[i].

[253] As a conſequence of this doctrine of eſcheat, all lands of inheritance immediately reveſting in the lord, the wife of the felon was liable to loſe her dower, till the ſtatute 1 Edw. VI. c. 12. enacted, that albeit any perſon be attainted of miſpriſion of treaſon, murder, or felony, yet his wife ſhall enjoy her dower. But ſhe has not this indulgence where the antient law of forfeiture operates, for it is expreſsly provided by the ſtatute 5 & 6 Edw. VI. c. 11. that the wife of one attaint of high treaſon ſhall not be endowed at all.

HITHERTO we have only ſpoken of eſtates veſted in the offender, at the time of his offence or attainder. And here the law of forfeiture ſtops; but the law of eſcheat purſues the matter ſtill farther. For, the blood of the tenant being utterly corrupted and extinguiſhed, it follows not only that all that he now has ſhall eſcheat from him, but alſo that he ſhall be incapable of inheriting any thing for the future. This may farther illuſtrate the diſtinction between forfeiture and eſcheat. If therefore a father be ſeiſed in fee, and the ſon commits treaſon and is attainted, and then the father

h 2 Inſt. 36.

i Somner. 53. Wright. Ten. 118.

dies: here the land ſhall eſcheat to the lord; becauſe the ſon, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life: but nothing ſhall be forfeited to the king, for the ſon never had any intereſt in the lands to forfeit [k]. In this caſe the eſcheat operates, and not the forfeiture; but in the following inſtance the forfeiture works, and not the eſcheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the caſe) that it ſhall not extend to corruption of blood; here the lands of the felon ſhall not eſcheat to the lord, but yet the profits of them ſhall be forfeited to the king for a year and a day, and ſo long after as the offender lives [l].

THERE is yet a farther conſequence of the corruption and extinction of hereditary blood, which is this: that the perſon attainted ſhall not only be incapable himſelf of inheriting, [254] or tranſmitting his own property by heirſhip, but ſhall alſo obſtruct the deſcent of lands or tenements to his poſterity, in all caſes where they are obliged to derive their title through him from any remoter anceſtor. The channel, which conveyed the hereditary blood from his anceſtors to him, is not only exhauſted for the preſent, but totally dammed up and rendered impervious for the future. This is a refinement upon the antient law of feuds, which allowed that the grandſon might be heir to his grandfather, though the ſon in the intermediate generation was guilty of felony [m]. But, by the law of England, a man's blood is ſo univerſally corrupted by attainder, that his ſons can neither inherit to him nor to any other anceſtor [n], at leaſt on the part of their attainted father.

THIS corruption of blood cannot be abſolutely removed but by authority of parliament. The king may excuſe the public puniſhment of an offender; but cannot aboliſh the private right, which has accrued or may accrue to individuals as a conſequence of the criminal's attainder. He may remit a forfeiture, in which the intereſt of the crown is alone con-

k Co. Litt 13.
l 3 Inſt. 47.
m Van Leeuwen *in* 2 *Feud.* 31.
n Co. Litt. 391.

cerned: but he cannot wipe away the corruption of blood; for therein a third perfon hath an intereft, the lord who claims by efcheat. If therefore a man hath a fon, and is attainted, and afterwards pardoned by the king; this fon can never inherit to his father, or father's anceftors; becaufe his paternal blood, being once thoroughly corrupted by his father's attainder, muft continue fo: but if the fon had been born after the pardon, he might inherit; becaufe by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children [o].

Herein there is however a difference between aliens and perfons attainted. Of aliens, who could never by any poffibility be heirs, the law takes no notice: and therefore we have [255] feen, that an alien elder brother fhall not impede the defcent to a natural-born younger brother. But in attainders it is otherwife: for if a man hath iffue a fon, and is attainted, and afterwards pardoned, and then hath iffue a fecond fon, and dies; here the corruption of blood is not removed from the eldeft, and therefore he cannot be heir; neither can the youngeft be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a poffibility of being heir: and therefore the younger brother fhall not inherit, but the land fhall efcheat to the lord: though had the elder died without iffue in the life of the father, the younger fon born after the pardon might well have inherited, for he hath no corruption of blood [p]. So if a man hath iffue two fons, and the elder in the lifetime of the father hath iffue, and then is attainted and executed, and afterwards the father dies, the lands of the father fhall not defcend to the younger fon: for the iffue of the elder, which had once a poffibility to inherit, fhall impede the defcent to the younger, and the land fhall efcheat to the lord [q]. Sir Edward Coke in this cafe allows [r], that if the anceftor be attainted, his fons born before the attainder may be heirs to each other; and diftinguifhes it from the cafe of the fons of an alien, becaufe in this cafe the blood was inheritable when imparted to them from the father: but

[o] Co. Litt. 392.
[p] *Ibid.* 8.
[q] Dyer. 48.
[r] Co. Litt. 8.

he

he makes a doubt (upon the principles beforementioned, which are now overruled [s]) whether ſons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

UPON the whole it appears, that a perſon attainted is neither allowed to retain his former eſtate, nor to inherit any future one, nor to tranſmit any inheritance to his iſſue, either immediately from himſelf, or mediately through himſelf from any remoter anceſtor; for his inheritable blood, which is neceſſary either to hold, to take, or to tranſmit any feodal property, is blotted out, corrupted, and extinguiſhed for ever: the conſequence of which is, that eſtates thus impeded in their deſcent, reſult back and eſcheat to the lord.

THIS corruption of blood, thus ariſing from feodal principles, but perhaps extended farther than even thoſe principles will warrant, has been long looked upon as a peculiar hardſhip: becauſe the oppreſſive parts of the feodal tenures being now in general aboliſhed, it ſeems unreaſonable to reſerve one of their moſt inequitable conſequences; namely, that the children ſhould not only be reduced to preſent poverty, (which, however ſevere, is ſufficiently juſtified upon reaſons of public policy) but alſo be laid under future difficulties of inheritance, on account of the guilt of their anceſtors. And therefore in moſt (if not all) of the new felonies created by parliament ſince the reign of Henry the eighth, it is declared that they ſhall not extend to any corruption of blood: and by the ſtatute 7 Ann. c. 21. (the operation of which is poſtponed by the ſtatute 17 Geo. II. c. 39.) it is enacted, that, after the death of the late pretender, and his ſons, no attainder for treaſon ſhall extend to the diſinheriting any heir, nor the prejudice of any perſon, other than the offender himſelf: which proviſions have indeed carried the remedy farther, than was required by the hardſhip above complained of; which is only the future obſtruction of deſcents, where the pedigree happens to be deduced through the blood of an attainted anceſtor. [256]

[s] 1 Hal. P. C. 357.

BEFORE I conclude this head, of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told[t], doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. [257] This is indeed founded upon the self-same principle as the law of escheat: the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vasal to be holden as of himself; till that practice was restrained by the statute of *quia emptores*, 18 Edw. I. st. 1. to which this very singular instance still in some degree remains an exception.

THERE is one more incapacity of taking by descent, which, not being productive of any escheat, is not strictly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute 11 & 12 Will. III. c. 4. (3) that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking, by descent, as well as purchase, any

[t] Co. Litt. 13.

(3) This act was repealed by the 18 Geo. III. c. 6. so far as to permit such Roman catholics to inherit real property, as would take the oath of allegiance prescribed in the statute; which is the same oath that is directed to be taken by the 31 Geo. III. c. 32; which has repealed all the other odious restrictions upon those who profess the Roman catholic religion.

real

real eſtates whatſoever; and his next of kin being a proteſtant, ſhall hold them to his own uſe till ſuch time as he complies with the terms impoſed by the act. This incapacity is merely perſonal; it affects himſelf only, and does not deſtroy the inheritable quality of his blood, ſo as to impede the deſcent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion and became a monk profeſſed was incapable of inheriting lands, both in our own [u] and the feodal law; *eo quod deſiit eſſe miles ſeculi qui factus eſt miles Chriſti; nec beneficium pertinet ad eum qui non debet gerere officium* [w]. But yet he was accounted only *civiliter mortuus;* he did not impede the deſcent to others, but the next heir was entitled to his or his anceſtor's eſtate.

THESE are the ſeveral deficiencies of hereditary blood, recognized by the law of England; which, ſo often as they happen, occaſion lands to eſcheat to the original proprietary or lord.

[u] Co. Litt. 132.

[w] 2 *Feud.* 21.

CHAPTER THE SIXTEENTH.

OF TITLE BY OCCUPANCY.

OCCUPANCY is the taking poſſeſſion of thoſe things, which before belonged to nobody. This, as we have ſeen [a], is the true ground and foundation of all property, or of holding thoſe things in ſeveralty, which by the law of nature, unqualified by that of ſociety, were common to all mankind. But when once it was agreed that every thing capable of ownerſhip ſhould have an owner, natural reaſon ſuggeſted, that he who could firſt declare his intention of appropriating any thing to his own uſe, and, in conſequence of ſuch intention, actually took it into poſſeſſion, ſhould thereby gain the abſolute property of it; according to that rule of the law of nations, recognized by the laws of Rome [b], *quod nullius eſt, id ratione naturali occupanti conceditur.*

THIS right of occupancy, ſo far as it concerns real property, (for of perſonal chattels I am not in this place to ſpeak) hath been confined by the laws of England within a very narrow compaſs; and was extended only to a ſingle inſtance: namely, where a man was tenant *pur auter vie,* or had an eſtate granted to himſelf only (without mentioning his heirs) for the life of another man, and died during the life of *ceſtuy que vie,* or him by whoſe life it was holden: in this caſe he, that could firſt enter on the land, might lawfully retain the poſſeſſion ſo long as *ceſtuy que vie* lived, by right of occupancy [c].

a See pag. 3 & 8.
b *Ff.* 41. 1. 3.
c Co. Litt. 41.

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THIS ſeems to have been recurring to firſt principles, and calling in the law of nature to aſcertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though it formerly[d] was ſuppoſed ſo to do; for he had parted with all his intereſt, ſo long as *ceſtuy que vie* lived: it did not eſcheat to the lord of the fee; for all eſcheats muſt be of the abſolute entire fee, and not of any particular eſtate carved out of it; much leſs of ſo minute a remnant as this: it did not belong to the grantee; for he was dead: it did not deſcend to his heirs; for there were no words of inheritance in the grant: nor could it veſt in his executors; for no executors could ſucceed to a freehold. Belonging therefore to nobody, like the *haereditas jacens* of the Romans, the law left it open to be ſeiſed and appropriated by the firſt perſon that could enter upon it, during the life of *ceſtuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reverſion of the lands; for the reverſioner hath an equal right with any other man to enter upon the vacant poſſeſſion, and where the king's title and a ſubject's concur, the king's ſhall be always preferred: againſt the king therefore there could be no prior occupant, becauſe *nullum tempus occurrit regi*[e]. And, even in the caſe of a ſubject, had the eſtate *pur auter vie* been granted to a man *and his heirs* during the life of *ceſtuy que vie*, there the heir might, and ſtill may, enter and hold poſſeſſion, and is called in law a *ſpecial occupant*; as having a ſpecial excluſive right, by the terms of the original grant, to enter upon and occupy this *haereditas jacens*, during the reſidue of the eſtate granted: though ſome have thought him ſo called with no very great propriety[f]; and that ſuch eſtate is rather a deſcendible freehold. But the title of common occupancy is now reduced almoſt to nothing by two ſtatutes: the one 29 Car. II. c. 3. which enacts (according to the antient rule of law[g]) that

[d] Bract. *l.* 2. *c.* 9. *l.* 4. *tr.* 3. *c.* 9. § 4. Flet. *l.* 3. *c.* 12. § 6. *l.* 5. *c.* 5. § 15.

[e] Co. Litt. 41.

[f] Vaugh. 201.

[g] Bract. *ibid.* Flet. *ibid.*

where

where there is no ſpecial occupant (1), in whom the eſtate may veſt, the tenant *pur auter vie* may deviſe it by will, or it ſhall go to the executors or adminiſtrators and be aſſets in their [260] hands for payment of debts: the other that of 14 Geo. II. c. 20. which enacts, that the ſurplus of ſuch eſtate *pur auter vie*, after payment of debts, ſhall go in a courſe of diſtribution like a chattel intereſt.

BY theſe two ſtatutes the title of *common* occupancy is utterly extinct and aboliſhed: though that of *ſpecial* occupancy, by the heir at law, continues to this day; ſuch heir being held to ſucceed to the anceſtor's eſtate, not by deſcent, for then he muſt take an eſtate of inheritance, but as an occupant ſpecially marked out and appointed by the original grant. But, as before the ſtatutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowſons, commons, or the like [g], (becauſe, with reſpect to them, there could be no actual entry made, or corporal ſeiſin had; and therefore by the death of the grantee *pur auter vie* a grant of ſuch hereditaments was entirely determined) ſo now, I apprehend, notwithſtanding theſe ſtatutes, ſuch grant would be determined likewiſe; and the hereditaments would not be deviſeable, nor veſt in the executors, nor go in a courſe of diſtribution. For theſe ſtatutes muſt not be conſtrued ſo as to create any new eſtate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reverſion; but merely to diſpoſe of an intereſt in being, to which by law there was no owner, and which therefore was left open to the firſt occupant (2). When there is a reſidue

[g] Co. Litt. 41. Vaugh. 201.

(1) That is, where it is not granted to a man *and his heirs*.

(2) Lord keeper Harcourt has declared, there is no difference ſince the 29 Car. II. c. 3. between a grant of corporeal and incorporeal hereditaments *pur auter vie*; for by that ſtatute every eſtate *pur auter vie* is made deviſeable, and if not deviſed, it ſhall be aſſets in the hands of the heir, if limited to the heir; if not limited to the heir, it ſhall

go

left, the ſtatutes give it to the executors and adminiſtrators, inſtead of the firſt occupant; but they will not *create* a reſidue, on purpoſe to give it to either [h]. They only meant to provide an appointed inſtead of a caſual, a certain inſtead of an uncertain, owner of lands which before were nobody's; and thereby to ſupply this *caſus omiſſus*, and render the diſpoſition of law in all reſpects entirely uniform: this being the only inſtance wherein a title to a real eſtate could ever be acquired by occupancy.

THIS, I ſay, was the only inſtance; for I think there can [261] be no other caſe deviſed, wherein there is not ſome owner of the land appointed by the law. In the caſe of a ſole corporation, as a parſon of a church, when he dies or reſigns, though there is no *actual* owner of the land till a ſucceſſor be appointed, yet there is a *legal*, *potential* ownerſhip, ſubſiſting in contemplation of law; and when the ſucceſſor is appointed, his appointment ſhall have a retroſpect and relation backwards, ſo as to entitle him to all the profits from the inſtant that the vacancy commenced. And, in all other inſtances, when the tenant dies inteſtate, and no other owner of the lands is to be found in the common courſe of deſcents, there the law veſts an ownerſhip in the king, or in the ſubordinate lord of the fee, by eſcheat.

So alſo in ſome caſes, where the laws of other nations give a right by occupancy, as in lands newly created, by the riſing

[h] But ſee now the ſtatute 5 Geo III. c. 17. which makes leaſes for one, two, or three lives by *eccleſiaſtical* perſons or any *eleemoſynary* corporation of tithes or other incorporeal hereditaments, as good and effectual *to all intents and purpoſes* as leaſes of corporeal poſſeſſions.

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go to the executors or adminiſtrators of the grantee, and be aſſets in their hands; and the ſtatute in the caſe of rents and other incorporeal hereditaments, does not enlarge, but only preſerve the eſtate of the grantee. *P. Wms.* 264. In p. 113, *ante*, it is ſaid, that an eſtate *pur auter vie* cannot be entailed; yet if ſuch an eſtate be limited to A in tail, with remainder to B, theſe limitations are deſignations of the perſons who ſhall take as ſpecial occupants; but any alienation of the *quaſi* tenant in tail will bar the intereſt of him in remainder. See *Cox P. Wms.* 266.

of

of an iſland in the ſea or in a river, or by the alluvion or dereliction of the waters; in theſe inſtances the law of England aſſigns them an immediate owner. For Bracton tells us [i], that if an iſland ariſe in the *middle* of a *river*, it belongs in common to thoſe who have lands on each ſide thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the neareſt ſhore: which is agreeable to, and probably copied from, the civil law [k]. Yet this ſeems only to be reaſonable, where the ſoil of the river is equally divided between the owners of the oppoſite ſhores: for if the whole ſoil is the freehold of any one man, as it uſually is whenever a ſeveral fiſhery is claimed [l], there it ſeems juſt (and ſo is the conſtant practice) that the eyotts or little iſlands, ariſing in any part of the river, ſhall be the property of him who owneth the piſcary and the ſoil. However, in caſe a new iſland riſe in the *ſea*, though the civil law gives it to the firſt occupant [m], yet ours gives it to the king [n]. And as to lands gained from
[262] the ſea, either by *alluvion*, by the waſhing up of ſand and earth, ſo as in time to make *terra firma*; or by *dereliction*, as when the ſea ſhrinks back below the uſual watermark; in theſe caſes the law is held to be, that if this gain be by little and little, by ſmall and imperceptible degrees, it ſhall go to the owner of the land adjoining [o]. For *de minimis non curat lex*: and, beſides, theſe owners, being often loſers by the breaking in of the ſea, or at charges to keep it out, this poſſible gain is therefore a reciprocal conſideration for ſuch poſſible charge or loſs. But, if the alluvion or dereliction be ſudden and conſiderable, in this caſe it belongs to the king; for, as the king is lord of the ſea, and ſo owner of the ſoil while it is covered with water, it is but reaſonable he ſhould have the ſoil, when the water has left it dry [p]. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's, or the ſubject's property. In the ſame manner if a river, running between

[i] *l*. 2. *c*. 2.
[k] *Inſt*. 2. 1. 22.
[l] Salk. 637. See pag. 39.
[m] *Inſt*. 2. 1. 18.
[n] Bract. *l*. 2. *c*. 2. Callis of ſewers. 22.
[o] 2 Roll. Abr. 170. Dyer. 326.
[p] Callis. 24. 28.

two

two lordſhips, by degrees gains upon the one, and thereby leaves the other dry; the owner who loſes his ground thus imperceptibly has no remedy: but if the courſe of the river be changed by a ſudden and violent flood, or other haſty means, and thereby a man loſes his ground, it is ſaid that he ſhall have what the river has left in any other place, as a recompenſe for this ſudden loſs [q]. And this law of alluvions and dereliƈtions, with regard to *rivers*, is nearly the ſame in the imperial law [r]; from whence indeed thoſe our determinations ſeem to have been drawn and adopted: but we ourſelves, as iſlanders, have applied them to *marine* increaſes; and have given our ſovereign the prerogative he enjoys, as well upon the particular reaſons before-mentioned, as upon this other general ground of prerogative, which was formerly remarked [s], that whatever hath no other owner is veſted by law in the king.

q Callis. 28.

r *Inſt.* 2. 1. 20, 21, 22, 23, 24.

s See Vol. I. pag. 298.

CHAPTER THE SEVENTEENTH.

OF TITLE BY PRESCRIPTION.

A THIRD method of acquiring real property by purchase is that by *prescription;* as when a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at large in the preceding part of these commentaries [a]. At present therefore I shall only, first, distinguish between *custom,* strictly taken, and *prescription;* and then shew, what sort of things may be prescribed for.

AND, first, the distinction between custom and prescription is this; that custom is properly a *local* usage, and not annexed to any *person;* such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* usage; as, that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege [b]. As for example; if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation; (which is held [c] to be a lawful usage) this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons:* but if the

[a] See Vol. I. pag. 75, &c.

[b] Co. Litt. 113.

[c] 1 Lev. 176.

tenant,

tenant, who is feifed of the manor of Dale in fee, alleges that he and his anceftors, or all thofe whofe eftate he hath in the faid manor, have ufed time out of mind to have common of pafture in fuch a clofe, this is properly called a prefcription; for this is a ufage annexed to the *perfon* of the owner of this eftate. All prefcription muft be either in a man and his anceftors, or in a man and thofe whofe eftate he hath [d]: which laft is called prefcribing in a *que eftate.* And formerly a man might, by the common law, have prefcribed for a right which had been enjoyed by his anceftors or predeceffors at any diftance of time, though his or their enjoyment of it had been fufpended [e] for an indefinite feries of years. But by the ftatute of limitations, 32 Hen. VIII. c. 2. it is enacted, that no perfon fhall make any prefcription by the feifin or poffeffion of his anceftor or predeceffor, unlefs fuch feifin or poffeffion hath been within threefcore years next before fuch prefcription made [f].

SECONDLY, as to the feveral fpecies of things which may, or may not, be prefcribed for: we may, in the firft place, obferve, that nothing but incorporeal hereditaments can be claimed by prefcription; as a right of way, a common, *&c*; but that no prefcription can give a title to lands, and other corporeal fubftances, of which more certain evidence may be had [g]. For a man fhall not be faid to prefcribe, that he and his anceftors have immemorially ufed to hold the caftle of Arundel: for this is clearly another fort of title; a title by corporal feifin and inheritance, which is more permanent, and therefore more capable of proof, than that of prefcription. But, as to a right of way, a common, or the like, a man may be allowed to prefcribe; for of thefe there is no corporal feifin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing elfe but immemorial ufage. 2. A prefcription muft always be

[d] 4 Rep. 32.

[e] Co. Litt. 113.

[f] This title, of prefcription, was well known in the Roman law by the name of *ufucapio*; (*Ff.* 41. 3. 3.) fo called becaufe a man, that gains a title by prefcription, may be faid *ufu rem capere.*

[g] Dr & St. dial. 1. c. 8. Finch. 132.

laid

laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot preſcribe, by reaſon of the imbecility of their eſtates [h]. For, as preſcription is uſage beyond time of memory, it is abſurd that they ſhould pretend to preſcribe for any thing, whoſe eſtates commenced within the remembrance of man. And therefore the copyholder muſt preſcribe under cover of his lord's eſtate, and the tenant for life under cover of the tenant in fee-ſimple. As, if tenant for life of a manor would preſcribe for a right of common as appurtenant to the ſame, he muſt preſcribe under cover of the tenant in fee-ſimple; and muſt plead that John Stiles and his anceſtors had immemorially uſed to have this right of common, appurtenant to the ſaid manor, and that John Stiles demiſed the ſaid manor, with it's appurtenances, to him the ſaid tenant for life. 3. A preſcription cannot be for a thing which cannot be raiſed by grant. For the law allows preſcription only in ſupply of the loſs of a grant, and therefore every preſcription preſuppoſes a grant to have exiſted. Thus the lord of a manor cannot preſcribe to raiſe a tax or toll upon ſtrangers; for, as ſuch claim could never have been good by any grant, it ſhall not be good by preſcription [i]. 4. A fourth rule is, that what is to ariſe by matter of record cannot be preſcribed for, but muſt be claimed by grant, entered on record; ſuch as, for inſtance, the royal franchiſes of deodands, felons' goods, and the like. Theſe, not being forfeited till the matter on which they ariſe is found by the inquiſition of a jury, and ſo made a matter of record, the forfeiture itſelf cannot be claimed by any inferior title. But the franchiſes of treaſure-trove, waifs, eſtrays, and the like, may be claimed by preſcription; for they ariſe from private contingencies, and not from any matter of record [k]. 5. Among things incorporeal, which may be claimed by preſcription, a diſtinction muſt be made with regard to the manner of preſcribing; that is, whether a man ſhall preſcribe in a *que eſtate*, or in himſelf and his anceſtors. For, if a man preſcribes in a *que eſtate*, (that is, in himſelf and thoſe whoſe eſtate he holds) nothing

h 4 Rep. 31, 32.
i 1 Ventr. 387.
k Co. Litt. 114.

is

is claimable by this prefcription, but fuch things as are incident, appendant, or appurtenant to lands; for it would be abfurd to claim any thing as the confequence, or appendix, of an eftate, with which the thing claimed has no connexion: but, if he prefcribes in himfelf and his anceftors, he may prefcribe for any thing whatfoever that lies in grant; not only things that are appurtenant, but alfo fuch as may be in grofs [l]. Therefore a man may prefcribe, that he, and thofe whofe eftate he hath in the manor of Dale, have ufed to hold the advowfon of Dale, as *appendant* to that manor: but, if the advowfon be a diftinct inheritance, and not appendant, then he can only prefcribe in his anceftors. So alfo a man may prefcribe in a *que eftate* for a common *appurtenant* to a manor; but, if he would prefcribe for a common *in grofs*, he muft prefcribe in himfelf and his anceftors. 6. Laftly, we may obferve, that eftates gained by prefcription are not, of courfe, defcendible to the heirs general, like other purchafed eftates, but are an exception to the rule. For, properly fpeaking, the prefcription is rather to be confidered as an evidence of a former acquifition, than as an acquifition *de novo*: and therefore, if a man prefcribes for a right of way in himfelf and his anceftors, it will defcend only to the blood of that line of anceftors in whom he fo prefcribes; the prefcription in this cafe being indeed a fpecies of defcent. But, if he prefcribes for it in a *que eftate*, it will follow the nature of that eftate in which the prefcription is laid, and be inheritable in the fame manner, whether that were acquired by defcent or purchafe; for every acceffory followeth the nature of it's principal.

[l] Litt. § 183. Finch. L. 104.

CHAPTER THE EIGHTEENTH.

OF TITLE BY FORFEITURE.

FORFEITURE is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.

LANDS, tenements, and hereditaments, may be forfeited in various degrees and by various means: 1. By crimes and misdemesnors. 2. By alienation contrary to law. 3. By non-presentation to a benefice, when the forfeiture is denominated a *lapse*. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

I. THE foundation and justice of forfeitures for *crimes and misdemesnors*, and the several degrees of those forfeitures, proportioned to the several offences, have been hinted at in the preceding volume [a]; but will be more properly considered, and more at large, in the fourth book of these commentaries. At present I shall only observe in general, that the offences which induce a forfeiture of lands and tenements to the crown are principally the following six: 1. Treason. 2. Felony. 3. Misprision of treason. 4. *Praemunire*. 5. Drawing a weapon on a judge, or striking any one in the presence of

[a] Vol. I. pag. 299.

the

the king's principal courts of juſtice. 6. Popiſh recuſancy, or non-obſervance of certain laws enacted in reſtraint of papiſts. But at what time they ſeverally commence, how far they extend, and how long they endure, will with greater propriety be reſerved as the object of our future inquiries.

II. LANDS and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants*; in the two former of which caſes the forfeiture ariſes from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. ALIENATION in *mortmain*, *in mortua manu*, is an alienation of lands or tenements to any corporation, ſole or aggregate, eccleſiaſticcl or temporal. But theſe purchaſes having been chiefly made by religious houſes, in conſequence whereof the lands became perpetually inherent in one dead hand, this hath occaſioned the general appellation of mortmain to be applied to ſuch alienations [b], and the religious houſes themſelves to be principally conſidered in forming the ſtatutes of mortmain; in deducing the hiſtory of which ſtatutes, it will be matter of curioſity to obſerve the great addreſs and ſubtle contrivance of the eccleſiaſtics in eluding from time to time the laws in being, and the zeal with which ſucceſſive parliaments have purſued them through all their fineſſes: how new remedies were ſtill the parents of new evaſions; till the legiſlature at laſt, though with difficulty, hath obtained a deciſive victory.

BY the common law any man might diſpoſe of his lands to any other private man at his own diſcretion, eſpecially when the feodal reſtraints of alienation were worn away. Yet in conſequence of theſe it was always, and is ſtill, neceſſary [c], for corporations to have a licence in mortmain from the crown, to enable them to purchaſe lands; for as the king is the ultimate lord of every fee, he ought not, un-

b See Vol. I. pag. 479.

c F. N. B. 121.

lefs by his own confent, to lofe his privilege of efcheats and other feodal profits, by the vefting of lands in tenants that can never be attainted or die. And fuch licences of mortmain feem to have been neceffary among the Saxons, above fixty years before the Norman conqueft [d]. But, befides this general licence from the king, as lord paramount of the kingdom, it was alfo requifite, whenever there was a mefne or intermediate lord between the king and the alienor, to obtain his licence alfo, (upon the fame feodal principles) for the alienation of the fpecific land. And if no fuch licence was obtained, the king or other lord might refpectively enter on the lands fo aliened in mortmain, as a forfeiture. The neceffity of this licence from the crown was acknowleged by the conftitutions of Clarendon [e], in refpect of advowfons, which the monks always greatly coveted, as being the groundwork of fubfequent appropriations [f]. Yet fuch were the influence and ingenuity of the clergy, that (notwithftanding this fundamental principle) we find that the largeft and moft confiderable dotations of religious houfes happened within lefs than two centuries after the conqueft. And (when a licence could not be obtained) their contrivance feems to have been this: that, as the forfeiture for fuch alienations accrued in the firft place to the immediate lord of the fee, the tenant who meant to alienate firft conveyed his lands to the religious houfe, and inftantly took them back again, to hold as tenant to the monaftery; which kind of inftantaneous feifin was probably held not to occafion any forfeiture: and then, by pretext of fome other forfeiture, furrender, or efcheat, the fociety entered into thofe lands in right of fuch their newly acquired figniory, as immediate lords of the fee. But, when thefe dotations began to grow numerous, it was obferved that the feodal fervices, ordained for the defence of the kingdom, were every day vifibly withdrawn; that the circulation of landed property from man to man began to ftagnate; and that the lords were curtailed of the fruits of

d Selden. Jan. Angl. l. 2. § 45.

e *Ecclefiae de feudo domini regis non poffunt in perpetuum dari, abfque affenfu et confenfione ipfius. c. 2. A. D.* 1164.

f See Vol. I. p. 384.

their

their ſigniories, their eſcheats, wardſhips, reliefs, and the like: and therefore in order to prevent this, it was ordered by the ſecond of king Henry III's great charter[g], and afterwards by that printed in our common ſtatute-book, that all ſuch attempts ſhould be void, and the land forfeited to the lord of the fee[h].

BUT, as this prohibition extended only to religious *houſes*, biſhops and other ſole corporations were not included therein; and the aggregate eccleſiaſtical bodies (who, ſir Edward Coke obſerves[i], in this were to be commended, that they ever had of their counſel the beſt learned men that they could get) found many means to creep out of this ſtatute, by buying in lands that were *bona fide* holden of themſelves as lords of the fee, and thereby evading the forfeiture; or by taking long leaſes for years, which firſt introduced thoſe extenſive terms, for a thouſand or more years, which are now ſo frequent in conveyances. This produced the ſtatute *de religioſis*, 7 Edw. I; which provided, that *no perſon*, religious or other whatſoever, ſhould buy, or ſell, or receive, under pretence of a gift, or term of years, or any other title whatſoever, nor ſhould by any art or ingenuity appropriate to himſelf, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.

THIS ſeemed to be a ſufficient ſecurity againſt all alienations in mortmain: but as theſe ſtatutes extended only to gifts and conveyances between the parties, the religious houſes now began to ſet up a fictitious title to the land, which it was intended they ſhould have, and to bring an

[g] *A. D.* 1217, *cap.* 43. *edit. Oxon.*

[h] *Non licet alicui de caetero dare terram ſuam alicui domui religioſae, ita quod illam reſumat tenendam de eadem domo; nec liceat alicui domui religioſae terram alicujus ſic accipere, quod tradat illam ei a quo ipſam recepit tenendam: ſi quis autem de caetero terram ſuam domui religioſae ſic dederit, ut ſuper hoc convincatur, donum ſuum penitus caſſetur, ut terra illa domino ſuo illius feodi incurratur. Mag. Cart.* 9 *Hen. III c.* 36.

[i] 2 Inſt. 75.

action

action to recover it againſt the tenant; who, by fraud and colluſion, made no defence, and thereby judgment was given for the religious houſe, which then *recovered* the land by ſentence of law upon a ſuppoſed prior title. And thus they had the honour of inventing thoſe fictitious adjudications of right, which are ſince become the great aſſurance of the kingdom, under the name of *common recoveries*. But upon this the ſtatute of Weſtminſter the ſecond, 13 Edw. I. c. 32. enacted, that in ſuch caſes a jury ſhall try the true right of the demandants or plaintiffs to the land, and if the religious houſe or corporation be found to have it, they ſhall ſtill recover ſeiſin; otherwiſe it ſhall be forfeited to the immediate lord of the fee, or elſe to the next lord, and finally to the king, upon the immediate or other lord's default. And the like proviſion was made by the ſucceeding chapter [k], in caſe the tenants ſet up croſſes upon their lands (the badges of knights templars and hoſpitallers) in order to protect them from the feodal demands of their lords, by virtue of the privileges of thoſe religious and military orders. So careful indeed was this provident prince to prevent any future evaſions, that when the ſtatute of *quia emptores*, 18 Edw. I. aboliſhed all ſubinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord [l], a proviſo was inſerted [m] that this ſhould not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's licence by writ of *ad quod damnum* was marked out, by the ſtatute 27 Edw. I. ſt. 2. it was farther provided by ſtatute 34 Edw. I. ſt. 3. that no ſuch licence ſhould be effectual, without the conſent of the meſne or intermediate lords.

YET ſtill it was found difficult to ſet bounds to eccleſiaſtical ingenuity; for when they were driven out of all their former holds, they deviſed a new method of conveyance, by which the lands were granted, not to themſelves directly, but to nominal feoffees *to the uſe of* the religious houſes; thus diſtinguiſhing between the *poſſeſſion* and the *uſe*, and receiving

[k] *cap.* 33.
[l] 2 Inſt. 501.
[m] *cap.* 3.

the

the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new devise; for the statute 15 Ric. II. c. 5. enacts that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons; and that for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtile imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute 23 Hen. VIII. c. 10. declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

BUT, during all this time, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute 18 Edw. III. st. 3. c. 3. But, as doubts were conceived at the time of the revolution how far such licence was valid [n], since the kings had no

[n] Hawk. P. C. 391.

power

power to dispense with the statutes of mortmain by a clause of *non obstante*[o], which was the usual course, though it seems to have been unnecessary[p]: and as, by the gradual declension of mesne signiories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by the statute 7 & 8 W. III. c. 37. that the crown for the future at it's own discretion may grant licences to aliene or take in mortmain, of whomsoever the tenements may be holden.

AFTER the dissolution of monasteries under Henry VIII. though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. and M. c. 8. and, during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. c. 3. that appropriators may annex the great tithes to the vicarages; and that all benefices under 100 *l. per annum.* may be augmented by the purchase of lands, without licence of mortmain in either case; and the like provision hath been since made, in favour of the governors of queen Anne's bounty[q]. It hath also been held[r], that the statute 23 Hen. VIII. before mentioned did not extend to any thing but *superstitious* uses; and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses. But as it was apprehended from recent experience, that persons on their deathbeds might make large and improvident dispositions even for these good purposes, and defeat the political end of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c. 36. that no lands or tenements, or money to be laid out thereon, shall be given for or charged

[o] Stat. 1 W. & M. st. 2. c. 2.
[p] Co. Litt. 99.
[q] Stat. 2 & 3 Ann, c. 11.
[r] 1 Rep. 24.

with

with any *charitable* uſes whatſoever, unleſs by deed indented, executed in the preſence of two witneſſes twelve calendar months before the death of the donor, and enrolled in the court of chancery within ſix months after it's execution, (except ſtocks in the public funds, which may be transferred within ſix months previous to the donor's death) and unleſs ſuch gift be made to take effect immediately, and be without power of revocation: and that all other gifts ſhall be void (1). The two univerſities, their colleges, and the ſcholars upon the foundation of the colleges of Eton, Wincheſter, and Weſtminſter, are excepted out of this act: but ſuch exemption was granted with this proviſo, that no college ſhall be at liberty to purchaſe more advowſons, than are equal in number to one moiety of the fellows or ſtudents (2), upon the reſpective foundations.

2. SECONDLY, alienation *to an alien* is alſo a cauſe of forfeiture to the crown of the land ſo alienated; not only on account of his incapacity to hold them, which occaſions him to be paſſed by in deſcents of land[s], but likewiſe on account of his preſumption in attempting, by an act of his own, to

[s] See pag. 249, 250.

(1) Lord Hardwicke has declared, ſince this laſt mortmain act, that "there is no reſtriction whatſoever upon any one, from leav-"ing a ſum of money by will, or any other perſonal eſtate, to cha-"ritable uſes; provided it be to be continued as a perſonalty, and "the executors or truſtees are not obliged, or under a neceſſity of "laying it out in land, by virtue of any direction of the teſtator for "that purpoſe." 2 *Burn. Ec.* 509. *tit.* Mortm.

Money left to repair parſonage houſes, or to build upon land already in mortmain, is held not to be within the ſtatute. 1 *Bro.* 444. But a legacy to the corporation of queen Anne's bounty, is void; as by the rules of the corporation it muſt be laid out in land. 1 *Bro.* 13.

(2) That is, of one moiety of the ſtudents in thoſe colleges, in which there are no perſons ſtiled fellows. The advowſons annexed to headſhips are not to be computed. *S.* 5.

acquire

acquire any real property; as was obſerved in the preceding volume [t].

3. LASTLY, alienations *by particular tenants*, when they are greater than the law entitles them to make, and deveſt the remainder or reverſion [v], are alſo forfeitures to him whoſe right is attacked thereby. As, if tenant for his own life alienes by feoffment or fine for the life of another, or in tail, or in fee; theſe being eſtates, which either muſt or may laſt longer than his own, the creating them is not only beyond his power, and inconſiſtent with the nature of his intereſt, but is alſo a forfeiture of his own particular eſtate to him in remainder or reverſion [u]. For which there ſeem to be two reaſons. Firſt, becauſe ſuch alienation amounts to a renuntiation of the feodal connexion and dependence; it implies a refuſal to perform the due renders and ſervices to the lord of
[275] the fee, of which fealty is conſtantly one; and it tends in it's conſequence to defeat and deveſt the remainder or reverſion expectant: as therefore that is put in jeopardy, by ſuch act of the particular tenant, it is but juſt that, upon diſcovery, the particular eſtate ſhould be forfeited and taken from him, who has ſhewn ſo manifeſt an inclination to make an improper uſe of it. The other reaſon is, becauſe the particular tenant, by granting a larger eſtate than his own, has by his own act determined and put an entire end to his own original intereſt; and on ſuch determination the next taker is entitled to enter regularly, as in his remainder or reverſion. The ſame law, which is thus laid down with regard to tenants for life, holds alſo with reſpect to all tenants of the mere freehold or of chattel intereſts; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere *diſcontinuance* (as it is called [w]) of the eſtate-tail, which the iſſue may afterwards avoid by due courſe of law [x]: for he in remainder or reverſion hath only a very remote and barely poſſible intereſt therein, until the iſſue in tail is extinct. But,

t Book I. pag. 372.
v Co. Litt. 251.
u Litt. § 415.
w See book III. ch. 10.
x Litt. § 595. 6. 7.

in cafe of fuch forfeitures by particular tenants, all legal eftates by them before created, as if tenant for twenty years grants a leafe for fifteen, and all charges by him lawfully made on the lands, fhall be good and available in law [y]. For the law will not hurt an innocent leffee for the fault of his leffor; nor permit the leffor, after he has granted a good and lawful eftate, by his own act to avoid it, and defeat the intereft which he himfelf has created.

EQUIVALENT, both in it's nature and it's confequences, to an illegal alienation by the particular tenant, is the civil crime of *difclaimer*; as where a tenant, who holds of any lord, neglects to render him the due fervices, and, upon an action brought to recover them, difclaims to hold of his lord. Which difclaimer of tenure in any court of record is a forfeiture of the lands to the lord [z], upon reafons moft apparently feodal. And fo likewife, if in any court of record the [276] particular tenant does any act which amounts to a virtual difclaimer; if he claims any greater eftate than was granted him at the firft infeodation, or takes upon himfelf thofe rights which belong only to tenants of a fuperior clafs [a]; if he affirms the reverfion to be in a ftranger, by accepting his fine, attorning as his tenant, collufive pleading, and the like [b]; fuch behaviour amounts to a forfeiture of his particular eftate.

III. LAPSE is a fpecies of forfeiture, whereby the right of prefentation to a church accrues to the ordinary by neglect of the patron to prefent, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For it being for the intereft of religion, and the good of the public, that the church fhould be provided with an officiating minifter, the law has therefore given this right of lapfe, in order to quicken the patron; who might otherwife, by fuffering the church to remain vacant, avoid paying his ecclefiaftical dues, and fruftrate the pious intentions of his ancef-

[y] Co. Litt. 233

[z] Finch. 270, 271.

[a] Co. Litt. 252.

[b] *Ibid.* 253.

tors.

tors. This right of lapſe was firſt eſtabliſhed about the time (though not by the authority[c]) of the council of Lateran[d], which was in the reign of our Henry the ſecond, when the biſhops firſt began to exerciſe univerſally the right of inſtitution to churches[e]. And therefore, where there is no right of inſtitution, there is no right of lapſe: ſo that no donative can lapſe to the ordinary[f], unleſs it hath been augmented by the queen's bounty[g]. But no right of lapſe can accrue, when the original preſentation is in the crown[h] (3).

THE term, in which the title to preſent by lapſe accrues from the one to the other ſucceſſively, is ſix *calendar* months[i]; (following in this caſe the computation of the church, and not the uſual one of the common law) and this excluſive of [277] the day of the avoidance[k]. But, if the biſhop be both patron and ordinary, he ſhall not have a double time allowed him to collate in[l]; for the forfeiture accrues by law, whenever the negligence has continued ſix months in the ſame perſon. And alſo if the biſhop doth not collate his own clerk immediately to the living, and the patron preſents, though after the ſix months are lapſed, yet his preſentation is good, and the biſhop is bound to inſtitute the patron's clerk[m]. For as the law only gives the biſhop this title by lapſe, to puniſh the patron's negligence, there is no reaſon that, if the biſhop himſelf be guilty of equal or greater negligence, the patron ſhould be deprived of his turn. If the biſhop ſuffer the preſentation to lapſe to the metropolitan, the patron alſo has the ſame advantage if he preſents before the archbiſhop has filled

c 2 Roll. Abr. 336. pl. 10.
d Bracton. *l.* 4. *tr.* 2. *c.* 3.
e See pag. 23.
f Bro. *Abr. tit. Quar. Imped.* 131. Cro. Jac. 518.
g St. 1 Geo. I. ſt. 2. c. 10.
h Stat. 17 Edw. II. c. 8. 2 Inſt. 273.
i 6 Rep. 62. Regiſt. 42.
k 2 Inſt. 361.
l Gibs. Cod. 769.
m 2 Inſt. 273.

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(3) If a right of lapſe accrues to the biſhop and he dies, or is tranſlated before he avails himſelf of it, the right of preſentation to the lapſed benefice does not paſs to the king, like the vacant patronage of the ſee, but to the guardian of the ſpiritualities. *Gibſ.* 770.

up the benefice; and that for the ſame reaſon. Yet the ordinary cannot, after lapſe to the metropolitan, collate his own clerk to the prejudice of the arch-biſhop [n]. For he had no permanent right and intereſt in the advowſon, as the patron hath, but merely a temporary one; which having neglected to make uſe of during the time, he cannot afterwards retrieve it. But if the preſentation lapſes to the king, prerogative here intervenes and makes a difference; and the patron ſhall never recover his right till the king has ſatisfied his turn by preſentation: for *nullum tempus occurrit regi* [o]. And therefore it may ſeem, as if the church might continue void for ever, unleſs the king ſhall be pleaſed to preſent; and a patron thereby be abſolutely defeated of his advowſon. But to prevent this inconvenience, the law has lodged a power in the patron's hands, of as it were compelling the king to preſent. For if, during the delay of the crown, the patron himſelf preſents, and his clerk is inſtituted, the king indeed by preſenting another may turn out the patron's clerk; or, after induction, may remove him by *quare impedit*: but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath loſt his right, which was only to the next or firſt preſentation [p].

IN caſe the benefice becomes void by death, or ceſſion through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for theſe are matters of equal notoriety to the patron and ordinary: but in caſe of a vacancy by reſignation, or canonical deprivation, or if a clerk preſented be refuſed for inſufficiency, theſe being matters of which the biſhop alone is preſumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwiſe he can take no advantage by way of lapſe [q] (4). Neither ſhall any lapſe thereby accrue to the metropolitan or to the king; for it is univerſally true, that [278]

n 2 Roll. Abr. 368.
o Dr. & St. d. 2. c. 36. Cro. Car. 355.
p 7 Rep. 28. Cro. Eliz. 44.
q 4 Rep. 75. 2 Inſt. 632.

(4) See 1 Vol. p. 392, notes 33 and 37.

neither the arch-bishop or the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem* [r]. If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is stiled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong [s]. Also if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided [t].

IV. BY *simony*, the right of presentation to a living is forfeited and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as sir Edward Coke observes [u], it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However it was not an offence punishable in a criminal way
[279] at the common law [w]; it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, with regard to spiritual preferments, calls aloud to be put in execution. I shall briefly consider them in this place, because they devest the corrupt patron of the right of presentation, and vest a new right in the crown.

BY the statute 31 Eliz. c. 6. it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift

r Co. Litt. 344, 345.
s 2 Roll. Abr. 369.
t Co. Litt. 344.
u 3 Inst. 156.
w Moor. 564.

or promiſe (5), directly or indirectly, ſhall preſent or collate any perſon to an eccleſiaſtical benefice or dignity; ſuch preſentation ſhall be void, and the preſentee be rendered incapable of ever enjoying the ſame benefice: and the crown ſhall preſent to it for that turn only [x]. But if the preſentee dies, without being convicted of ſuch ſimony in his life-time, it is enacted by ſtat. 1 W. & M. c. 16. that the ſimoniacal contract ſhall not prejudice any other innocent patron, on pretence of lapſe to the crown or otherwiſe. Alſo by the ſtatute 12 Ann. ſtat. 2. c. 12. if any perſon for money or profit ſhall procure, in his own name or the name of any other, the next preſentation to any living eccleſiaſtical, and ſhall be preſented thereupon, this is declared to be a ſimoniacal contract; and the party is ſubjected to all the eccleſiaſtical penalties of ſimony, is diſabled from holding the benefice, and the preſentation devolves to the crown.

UPON theſe ſtatutes many queſtions have ariſen, with regard to what is, and what is not ſimony. And, among others, theſe points ſeem to be clearly ſettled: 1. That to purchaſe a preſentation, the living being actually vacant, is open and notorious ſimony [y]; this being expreſsly in the face of the ſtatute (6). 2. That for a clerk to bargain for the next preſentation, the incumbent being ſick and about to die, was ſimony, even before the ſtatute of queen Anne [z] (7): and

x For other penalties inflicted by this ſtatute, ſee book IV. ch. 4.

y Cro. Eliz. 788. Moor. 914.

z Hob. 165.

(5) The words of the ſtatute are "for any ſum of money, reward, gift, profit, or benefit; or for any promiſe, agreement, grant, bond, covenant of or for any ſum of money, reward, gift, profit, or benefit."

(6) Lord Hardwicke was of opinion, that the ſale of an advowſon during a vacancy, is not within the ſtatute of ſimony as the ſale of the next preſentation is; but it is void by the common law. *Amb.* 268. See p. 22. *ante*, n. 1.

(7) It has been determined, that the purchaſe of an advowſon in fee, when the incumbent was upon his death-bed, without any privity of the clerk who was afterwards preſented, was not ſimoniacal, and would not vacate the next preſentation. 2 *Bl. Rep.* 1052.

 now,

now, by that ſtatute, to purchaſe, either in his own name or another's, the next preſentation, and be thereupon preſented
[280] at any future time to the living, is direct and palpable ſimony. But, 3. It is held that for a father to purchaſe ſuch a preſentation, in order to provide for his ſon, is not ſimony: for the ſon is not concerned in the bargain, and the father is by nature bound to make a proviſion for him [a]. 4. That if a ſimoniacal contract be made with the patron, the clerk not being privy thereto, the preſentation for that turn ſhall indeed devolve to the crown, as a puniſhment of the guilty patron; but the clerk, who is innocent, does not incur any diſability or forfeiture [b]. 5. That bonds given to pay money to charitable uſes, on receiving a preſentation to a living, are not ſimoniacal [c], provided the patron or his relations be not benefited thereby [d]; for this is no corrupt conſideration, moving to the patron. 6. That bonds of reſignation, in caſe of non-reſidence or taking any other living, are not ſimoniacal [e]; there being no corrupt conſideration herein, but ſuch only as is for the good of the public. So alſo bonds to reſign, when the patron's ſon comes to canonical age, are legal; upon the reaſon before given, that the father is bound to provide for his ſon [f]. 7. Laſtly, general bonds to reſign at the patron's requeſt are held to be legal [g]: for they may poſſibly be given for one of the legal conſiderations beforementioned; and where there is a poſſibility that a tranſaction may be fair, the law will not ſuppoſe it iniquitous without proof (8). But, if the party can prove the contract to have

a Cro. Eliz. 686. Moor. 916.
b 3 Inſt. 154. Cro. Jac. 385.
c Noy. 142.
d Stra. 534.
e Cro. Car. 180.
f Cro. Jac. 248. 274.
g Cro. Car. 180. Stra. 227.

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(8) In the great caſe of the biſhop of London *v.* Ffytche, it was determined by the houſe of lords, that a general bond of reſignation is ſimoniacal and illegal. The circumſtances of that caſe were briefly theſe: Mr. Ffytche the patron preſented Mr. Eyre his clerk, to the biſhop of London for inſtitution. The biſhop refuſed to admit the preſentation, becauſe Mr. Eyre had given a general bond of reſignation; upon this, Mr. Ffytche brought a *quare impedit* againſt the biſhop, to which the biſhop pleaded, that the

been a corrupt one, ſuch proof will be admitted, in order to ſhew the bond ſimoniacal, and therefore void. Neither will

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the preſentation was ſimoniacal and void, by reaſon of the bond of reſignation; and to this plea Mr. Ffytche demurred. From a ſeries of judicial deciſions, the court of common pleas thought themſelves bound to determine in his favour; and that judgment was affirmed by the court of king's bench; but theſe judgments were afterwards reverſed by the houſe of lords. The principal queſtion was this, *viz.* whether ſuch a bond was a *reward, gift, profit, or benefit,* to the patron under the 31 Eliz. c. 6: if it were ſo, the ſtatute had declared the preſentation to be ſimoniacal and void. Such a bond is ſo manifeſtly intended by the parties, to be a *benefit* to the patron, that it is ſurpriſing that it ſhould ever have been argued and decided that it was not a *benefit* within the meaning of the ſtatute. Yet many learned men are diſſatisfied with this determination of the lords, and are of opinion that their judgment would be different, if the queſtion were brought before them a ſecond time. But it is generally underſtood that the lords, from a regard to their dignity, and to preſerve a conſiſtency in their judgments, will never permit a queſtion which they have once decided, to be again debated in their houſe. With reſpect to the influence which the judgments of the inferior courts ought to have upon the houſe of lords, the Editor conceives a diſtinction may be ſuggeſted between caſes ariſing merely upon the common law, and caſes which depend upon the conſtruction of a ſtatute. A ſeries of deciſions in the courts are the beſt evidence we can have of the common law; and the lords cannot find any adequate authority to oppoſe to theſe deciſions, or which would juſtify their reverſal: but upon the conſtruction of a ſtatute, where we have no reaſon to ſuſpect any variation from the original, they ſeem as fully competent to determine a queſtion, after any number of deciſions upon it in the courts below, as after the firſt; and the length of the ſeries can operate no farther than as an object of general convenience.

In this view of the ſubject, it is not inconſiſtent to approve of the judgment of the lords in the caſe of reſignation bonds; and at the ſame time to condemn their judgment in the caſe of Reeve *v.* Long, (ſee p. 169, *ante,* n. 1.) where their humanity led them to relax the ſeverity of the law. The caſe of the biſhop of London *v.* Ffytche is reported at length in Cunningham's Law of Simony, p. 52.

the patron be ſuffered to make an ill uſe of ſuch a general bond of reſignation; as by extorting a compoſition for tithes, procuring an annuity for his relation, or by demanding a reſignation wantonly or without good cauſe, ſuch as is approved by the law; as, for the benefit of his own ſon, or on account of non-reſidence, plurality of livings, or groſs immorality in the incumbent[h] (9).

[281] V. THE next kind of forfeitures are thoſe by *breach* or non-performance of a *condition* annexed to the eſtate, either expreſsly by deed at it's original creation, or impliedly by law from a principle of natural reaſon. Both which we conſidered at large in a former chapter[i].

VI. I THEREFORE now proceed to another ſpecies of forfeiture, *viz*. by *waſte*. Waſte, *vaſtum*, is a ſpoil or deſtruction in houſes, gardens, trees, or other corporeal hereditaments, to the diſheriſon of him that hath the remainder or reverſion in fee-ſimple or fee-tail[k].

WASTE is either *voluntary*, which is a crime of commiſſion, as by pulling down a houſe; or it is *permiſſive*, which is a matter of omiſſion only, as by ſuffering it to fall for want of neceſſary reparations. Whatever does a laſting da-

h 1 Vern. 411. 1 Equ. Caſ. Abr. 86, 87. Stra. 534.

i See chap. 10. pag. 152.

k Co. Litt. 53.

But in a late caſe where a bond was given to reſign a rectory, when the patron's ſon came of age, and before that time, to reſide, and to keep the chancel and rectory in repair, as this caſe differed from the former, and it was underſtood that it was intended to carry it up to the houſe of lords, it was decided by the court of king's bench in favour of the bond, without an argument. 4 *T. R.* 359. & 78.

(9) In an action by the incumbent for the uſe and occupation of his glebe, the defendant cannot give in evidence the ſimoniacal preſentation of the plaintiff. 5 *T. R.* 4. But it may be given in evidence by a defendant who is ſued for the tithes. *Hob.* 168.

mage to the freehold or inheritance is waſte [l]. Therefore removing wainſcot, floors, or other things once fixed to the freehold of a houſe, is waſte [m] (10). If a houſe be deſtroyed by tempeſt, lightning, or the like, which is the act of providence, it is no waſte: but otherwiſe, if the houſe be burnt by the careleſſneſs or negligence of the leſſee; though now by the ſtatute 6 Ann. c. 31. no action will lie againſt a tenant for an accident of this kind (11). Waſte may alſo be committed in ponds, dove-houſes, warrens, and the like; by ſo reducing the number of the creatures therein, that there will not be ſufficient for the reverſioner when he comes to the inheritance [n]. Timber alſo is part of the inheritance [o] (12). Such are oak, aſh, and elm in all places; and in ſome particular countries, by local cuſtom, where other trees are generally uſed for building, they are for that reaſon conſidered

[l] Hetl. 35.
[m] 4 Rep. 64.
[n] Co. Litt. 53.
[o] 4 Rep. 62.

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(10) The law upon this ſubject has been relaxed; for during the term the tenant may take away chimney-pieces or wainſcot, which he has put up; but not after the term, for he would then be a treſpaſſer. 1 *Atk.* 477. A fire-engine erected by tenant for life ſhall go to his executor. 3 *Atk.* 13. But the rule is different between the heir and executor, with regard to fixtures upon the inheritance that deſcends to the heir. *H. Bl.* 258.

(11) But if a leſſee covenants to pay rent, and to repair, with an expreſs exception of caſualties by fire, he may be obliged to pay rent during the whole term, though the premiſes are burnt down by accident, and never rebuilt by the leſſor. 1 *T. R.* 310.

(12) If during the eſtate of a mere tenant for life, timber is ſevered either by accident or by wrong, it belongs to the firſt perſon who has a veſted eſtate of inheritance. But where there are intermediate contingent eſtates of inheritance, and the timber is cut down by a combination between the tenant for life and the perſon who has the next veſted eſtate of inheritance; or if the tenant for life has himſelf ſuch eſtate and fells timber; in theſe caſes the chancellor will order it to be preſerved for him who has the firſt contingent eſtate of inheritance under the ſettlement. 3 *Cox's P. Wms.* 267. 3 *Woodd.* 400.

as timber; and to cut down ſuch trees, or top them, or do any other act whereby the timber may decay, is waſte[p]. But [282] underwood the tenant may cut down at any ſeaſonable time that he pleaſes[q]; and may take ſufficient eſtovers of common right for houſe-bote and cart-bote; unleſs reſtrained (which is uſual) by particular covenants or exceptions[r]. The converſion of land from one ſpecies to another is waſte. To convert wood, meadow, or paſture, into arable; to turn arable, meadow, or paſture, into woodland; or to turn arable or woodland into meadow or paſture; are all of them waſte[s]. For, as ſir Edward Coke obſerves[t], it not only changes the courſe of huſbandry, but the evidence of the eſtate; when ſuch a cloſe, which is conveyed and deſcribed as paſture, is found to be arable, and *e converſo*. And the ſame rule is obſerved, for the ſame reaſon, with regard to converting one ſpecies of edifice into another, even though it is improved in it's value[u]. To open the land to ſearch for mines of metal, coal, *&c.* is waſte; for that is a detriment to the inheritance[v]: but, if the pits or mines were open before, it is no waſte for the tenant to continue digging them for his own uſe[w]; for it is now become the mere annual profit of the land. Theſe three are the general heads of waſte, *viz.* in houſes, in timber, and in land. Though, as was before ſaid, whatever elſe tends to the deſtruction, or depreciating the value of the inheritance, is conſidered by the law as waſte.

LET us next ſee, who are liable to be puniſhed for committing waſte. And by the feodal law, feuds being originally granted for life only, we find that the rule was general for all vaſals or feudatories; "*ſi vaſallus feudum diſſipaverit,* "*aut inſigni detrimento deterius fecerit, privabitur*[x]." But in our antient common law the rule was by no means ſo large:

p Co. Litt. 53.
q 2 Roll Abr. 817.
r Co. Litt. 41.
s Hob. 296.
t 2 Inſt. 53.
u 1 Lev. 309.
v 5 Rep. 12.
w Hob. 295.
x Wright. 44.

for

for not only he that was ſeiſed of an eſtate of inheritance might do as he pleaſed with it, but alſo waſte was not puniſhable in any tenant, ſave only in three perſons; guardian in chivalry, tenant in dower, and tenant by the curteſy[y]; and not in tenant for life or years[z]. And the reaſon [283] of the diverſity was, that the eſtate of the three former was created by the act of the law itſelf, which therefore gave a remedy againſt them; but tenant for life, or for years, came in by the demiſe and leaſe of the owner of the fee, and therefore he might have provided againſt the committing of waſte by his leſſee; and if he did not, it was his own default. But, in favour of the owners of the inheritance, the ſtatutes of Marlbridge 52 Hen. III. c. 23. and of Glouceſter 6 Edw. I. c. 5. provided that the writ of waſte ſhall not only lie againſt tenants by the law of England, (or curteſy) and thoſe in dower, but againſt any farmer or other that holds in any manner for life or years. So that, for above five hundred years paſt, all tenants merely for life, or for any leſs eſtate, have been puniſhable or liable to be impeached for waſte, both voluntary and permiſſive; unleſs their leaſes be made, as ſometimes they are, without impeachment of waſte, *abſque impetitione vaſti;* that is, with a proviſion or protection that no man ſhall *impetere*, or ſue him, for waſte committed (13). But tenant

y It was however a doubt whether waſte was puniſhable at the common law in tenant by the curteſy. Regiſt. 72. Bro. Abr. *tit. waſte*. 88. 2 Inſt. 301.

z 2 Inſt. 299.

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(13) A tenant for life without impeachment of waſte has as full power of cutting down timber, and of opening new mines for his own uſe, as if he had an eſtate of inheritance; and is in the ſame manner entitled to the timber, if ſevered by others. 1 *T. R.* 56. *Harg. Co. Litt.* 220. But although ſuch a tenant for life may commit waſte for his own benefit, yet he may be reſtrained by an injunction out of the court of chancery from making *ſpoil and deſtruction* upon the eſtate. This diſtinction was firſt introduced in the caſe of lord Barnard, who was tenant for life without impeachment of waſte, with remainder to his eldeſt ſon in tail; and having conceived a diſpleaſure againſt his ſon, from motives of ſpleen, began

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in tail after poſſibility of iſſue extinct is not impeachable for waſte; becauſe his eſtate was at it's creation an eſtate of inheritance, and ſo not within the ſtatutes[a] (14). Neither does an action of waſte lie *for the debtor* againſt tenant by ſtatute, recognizance, or *elegit;* becauſe againſt them the debtor may ſet off the damages in account[b]: but it ſeems reaſonable that it ſhould lie *for the reverſioner*, expectant on the determination of the debtor's own eſtate, or of theſe eſtates derived from the debtor[c].

THE puniſhment for waſte committed was, by common law and the ſtatute of Marlbridge, only ſingle damages[d]; except in the caſe of a guardian, who alſo forfeited his wardſhip[e] by the proviſions of the great charter[f]: but the ſtatute of Glouceſter directs, that the other four ſpecies of tenants ſhall loſe and forfeit the place wherein the waſte is committed, and alſo treble damages, to him that hath the inheritance. The expreſſion of the ſtatute is, "he ſhall forfeit "the *thing* which he hath waſted;" and it hath been determined, that under theſe words the *place* is alſo included[g]. And if waſte be done *ſparſim*, or here and there, all over a wood, the whole wood ſhall be recovered; or if in ſeveral rooms of a
[284] houſe, the whole houſe ſhall be forfeited[h]; becauſe it is impracticable for the reverſioner to enjoy only the identical places waſted, when lying interſperſed with the other. But if waſte be done only in one end of a wood (or perhaps in

a Co. Litt. 27. 2 Roll. Abr. 826. 828.
b Co. Litt. 54.
c F. N. B. 58.
d 2 Inſt. 146.
e *Ibid.* 300.
f 9 Hen. III. c. 4.
g 2 Inſt. 303.
h Co. Litt. 54.

to pull down the family manſion Raby Caſtle; but he was reſtrained by the chancellor, and ordered to repair it. 2 *Vern.* 738. Since that caſe, ſuch a tenant has been reſtrained from cutting down avenues and ornamental timber in pleaſure grounds, and alſo young trees not fit for timber. 1 *Bro.* 166. 3 *Bro.* 549. See alſo 3 *Woodd.* 399. *et ſeq.* where this ſubject is fully and learnedly treated.

(14) See page 125. n. 3. *ante.*

one

one room of a houſe, if that can be conveniently ſeparated from the reſt) that part only is the *locus vaſtatus*, or thing waſted, and that only ſhall be forfeited to the reverſioner[i].

VII. A SEVENTH ſpecies of forfeiture is that of *copyhold* eſtates, by *breach* of the *cuſtoms* of the manor. Copyhold eſtates are not only liable to the ſame forfeitures as thoſe which are held in ſocage, for treaſon, felony, alienation, and waſte: whereupon the lord may ſeize them without any preſentment by the homage[k]; but alſo to peculiar forfeitures, annexed to this ſpecies of tenure, which are incurred by the breach of either the general cuſtoms of all copyholds, or the peculiar local cuſtoms of certain particular manors. And we may obſerve that, as theſe tenements were originally holden by the loweſt and moſt abject vaſals, the marks of feodal dominion continue much the ſtrongeſt upon this mode of property. Moſt of the offences, which occaſioned a reſumption of the fief by the feodal law, and were denominated *feloniae, per quas vaſallus amitteret feudum*[l], ſtill continue to be cauſes of forfeiture in many of our modern copyholds. As, by ſubtraction of ſuit and ſervice[m]; *ſi dominum deſervire noluerit*[n]: by diſclaiming to hold of the lord, or ſwearing himſelf not his copyholder[o]; *ſi dominum ejuravit, i. e. negavit ſe a domino feudum habere*[p]: by neglect to be admitted tenant within a year and a day[q]; *ſi per annum et diem ceſſaverit in petenda inveſtitura*[r]: by contumacy in not appearing in court after three proclamations[s]; *ſi a domino ter citatus non comparuerit*[t]: or by refuſing, when ſworn of the homage, to preſent the truth according to his oath[u]; *ſi pares veritatem noverint, et dicant ſe neſcire, cum ſciant*[w]. In [285] theſe and a variety of other caſes, which it is impoſſible here to enumerate, the forfeiture does not accrue to the lord

i 2 Inſt. 304.
k 2 Ventr. 38. Cro. Eliz. 499.
l *Feud. l.* 2. *t.* 26. *in calc.*
m 3 Leon. 108. Dyer. 211.
n *Feud. l.* 1. *t.* 21.
o Co. Copyh. § 57.
p *Feud. l.* 2. *t.* 34. & *t.* 26. § 3.
q Plowd. 372.
r *Feud. l.* 2. *t.* 24.
s 8 Rep. 99. Co. Copyh. § 57.
t *Feud. l.* 2. *t.* 22.
u Co. Copyh. § 57.
w *Feud. l.* 2. *t.* 58.

till

till after the offences are presented by the homage, or jury of the lord's court baron[x]; *per laudamentum parium suorum*[y]: or, as it is more fully expressed in another place[z], *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa, quae sit laudanda*[a] *per judicium parium suorum.*

VIII. THE eighth and last method, whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt: which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined; a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.

WHO shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter; when we shall endeavour more fully to explain it's nature, as it most immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and tenements is transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission of bankrupt is awarded and issued against him.

BY the statute 13 Eliz. c. 7. the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tenements which were purchased by him jointly with his wife or children to his own use, (or such interest therein as
286] he may lawfully part with) or purchased with any other person upon secret trust for his own use; and to cause them to be appraised to their full value, and to sell the same by deed indented and inrolled, or divide them proportionably among

x Co. Copyh. § 58.
y *Feud. l.* 1. *t.* 21.
z *Ibid. t.* 22.
a *i. e. arbitranda, definienda.* Du Fresne. IV. 79.

the creditors. This ſtatute expreſsly included not only free, but cuſtomary and copyhold, lands; but did not extend to eſtates-tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged eſtate, wherein the bankrupt has no legal intereſt, but only an equitable reverſion. Whereupon the ſtatute 21 Jac. I. c. 19. enacts, that the commiſſioners ſhall be impowered to ſell or convey, by deed indented and inrolled, any lands or tenements of the bankrupt, wherein he ſhall be ſeiſed of an eſtate-tail in poſſeſſion, remainder, or reverſion, unleſs the remainder or reverſion thereof ſhall be in the crown; and that ſuch ſale ſhall be good againſt all ſuch iſſues in tail, remainder-men, and reverſioners, whom the bankrupt himſelf might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged eſtates, ſhall be at the diſpoſal of the commiſſioners; for they ſhall have power to redeem the ſame, as the bankrupt himſelf might have done, and after redemption to ſell them. And alſo, by this and a former act [b], all fraudulent conveyances to defeat the intent of theſe ſtatutes are declared void; but that no purchaſor *bona fide*, for a good or valuable conſideration, ſhall be affected by the bankrupt laws, unleſs the commiſſion be ſued forth within five years after the act of bankruptcy committed (15).

By virtue of theſe ſtatutes a bankrupt may loſe all his real eſtates; which may at once be transferred by his commiſſioners to their aſſignees, without his participation or conſent.

[b] 1 Jac. I. c. 15.

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(15) If the wife of a bankrupt has lands before marriage, unleſs they are ſettled upon her for her ſeparate uſe, the huſband's intereſt in them ſhall be ſold, ſo that the wife can have no farther enjoyment of them until ſhe ſurvives her huſband.

CHAPTER THE NINETEENTH.

OF TITLE BY ALIENATION.

THE moſt uſual and univerſal method of acquiring a title to real eſtates is that of alienation, conveyance, or purchaſe in it's limited ſenſe: under which may be comprized any method wherein eſtates are voluntarily reſigned by one man, and accepted by another: whether that be effected by ſale, gift, marriage ſettlement, deviſe, or other tranſmiſſion of property by the mutual conſent of the parties.

THIS means of taking eſtates, by alienation, is not of equal antiquity in the law of England with that of taking them by deſcent. For we may remember that, by the feodal law [a], a pure and genuine feud could not be transferred from one feudatory to another without the conſent of the lord; leſt thereby a feeble or ſuſpicious tenant might have been ſubſtituted and impoſed upon him to perform the feodal ſervices, inſtead of one on whoſe abilities and fidelity he could depend. Neither could the feudatory then ſubject the land to his debts; for, if he might, the feodal reſtraint of alienation would have been eaſily fruſtrated and evaded [b]. And, as he could not aliene it in his life-time, ſo neither could he by will defeat the ſucceſſion, by deviſing his feud to another family; nor even alter the courſe of it, by impoſing particular limitations, or preſcribing an unuſual path of deſcent. Nor, in ſhort, could he aliene the eſtate, even with the conſent of the lord, unleſs he had alſo obtained the conſent of his own next apparent, or preſumptive heir [c]. And therefore it was very uſual in antient feoffments to expreſs, that

a See pag. 57.

b *Feud. l.* 1. *t.* 27.

c Co. Litt. 94. Wright. 168.

the

the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant[d]. And, on the other hand, as the feodal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his signiory without the consent of his vasal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seising of his cattle by the lord of a neighbouring clan[e]. This consent of the vasal was expressed by what was called *attorning*[f], or professing to become the tenant of the new lord: which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchasor, and to become his tenant, the grant or contract was in most cases void, or at least incomplete[g]: which was also an additional clog upon alienations.

BUT by degrees this feodal severity is worn off; and experience hath shewn, that property best answers the purposes of civil life, especially in commercial countries, when it's transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of king Henry the first, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power, than over what had been transmitted to him in a course of descent from his ancestors[h]:

[d] Madox, *Formul. Angl.* nº. 316. 319. 427.

[e] Gilb. Ten. 75.

[f] The same doctrine and the same denomination prevailed in Bretagne— *possessiones in jurisdictionalibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vasallus, ejurato prioris domini obsequio et fide, novo se sacramento novo item domino acquirenti obstringebat; idque jussu auctoris.* D'Argentre *Antiq. Consuet. Brit. apud* Dufresne. i. 819, 820.

[g] Litt. § 551.

[h] *Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam.* LL. *Hen. I. c.* 70.

a doctrine

a doctrine which is countenanced by the feodal constitutions themselves[i]: but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate[k]. Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by name; but, if his *assigns* were not specified in the purchase deed, he was not empowered to aliene[l]: and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir[m]. By the great charter of Henry III[n], no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land[o]. But these restrictions were in general removed by the statute of *quia emptores*[p], whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion[q]. And even these tenants *in capite*, were by the statute 1 Edw. III. c. 12. permitted to aliene, on paying a fine to the king[r]. By the temporary statutes 7 Hen. VII. c. 3. and 3 Hen. VIII. c. 4. all persons attending the king in his wars were allowed to aliene their lands without licence, and were relieved from other feodal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of *charging* lands with the debts of the owner, this was introduced so early as statute Westm. 2. which[s] subjected a *moiety* of the tenant's lands to executions, for debts recovered by law: as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*,

[i] *Feud. l.* 2. *t.* 39.

[k] *Si questum tantum habuerit is, qui partem terrae suae donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum haeredem exhaeredare.* Glanvil. *l.* 7. *c.* 1.

[l] Mirr. c. 1. § 3. This is also borrowed from the feodal law. *Feud. l.* 2. *t.* 48.

[m] Mirr. *ibid.*

[n] 9 Hen. III. c. 32.

[o] Dalrymple of feuds. 95.

[p] 18 Edw. I. c. 1.

[q] See pag. 72. 91.

[r] 2 Inst. 67.

[s] 13 Edw. I. c. 18.

made

made the ſame year, and in a ſtatute ſtaple by ſtatute 27 Edw. III. c. 9. and in other ſimilar recognizances by ſtatute 23 Hen. VIII. c. 6. And, now, the whole of them is not only ſubject to be *pawned* for the debts of the owner, but likewiſe to be abſolutely *ſold* for the benefit of trade and commerce by the ſeveral ſtatutes of bankruptcy. The reſtraint of *deviſing* lands by will, except in ſome places by particular cuſtom, laſted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued ſtill later than any of the reſt, and became extremely troubleſome, though many methods were invented to evade them; till at laſt, they were made no longer neceſſary to complete the grant or conveyance, by ſtatute 4 & 5 Ann. c. 16. nor ſhall, by ſtatute 11 Geo. II. c. 19. the attornment of any tenant affect the poſſeſſion of any lands, unleſs made with conſent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of juſtice. [290]

IN examining the nature of alienation, let us firſt inquire, briefly, who may aliene and to *whom;* and then, more largely, *how* a man may aliene, or the ſeveral modes of conveyance.

I. WHO may aliene, and to whom: or, in other words, who is capable of conveying and who of purchaſing. And herein we muſt conſider rather the incapacity, than capacity, of the ſeveral parties: for all perſons in *poſſeſſion* are *prima facie* capable both of conveying and purchaſing, unleſs the law has laid them under any particular diſabilities. But, if a man has only in him the *right* of either poſſeſſion or property, he cannot convey it to any other, leſt pretended titles might be granted to great men, whereby juſtice might be trodden down, and the weak oppreſſed [s]. Yet reverſions and veſted remainders may be granted; becauſe the poſſeſſion of the particular tenant is the poſſeſſion of him in reverſion or remainder: but *contingencies*, and mere *poſſibilities*, though they may be releaſed, or deviſed by will, or may paſs to the heir or executor, yet cannot (it hath been ſaid) be

[s] Co. Litt. 214.

aſſigned to a ſtranger, unleſs coupled with ſome preſent intereſt [t] (1).

PERSONS attainted of treaſon, felony, and *praemunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows [u]: for ſuch conveyance by
[291] them may tend to defeat the king of his forfeiture, or the lord of his eſcheat. But they may *purchaſe* for the benefit of the crown, or the lord of the fee, though they are diſabled to *hold:* the lands ſo purchaſed, if after attainder, being ſubject to immediate forfeiture; if before, to eſcheat as well as forfeiture, according to the nature of the crime [w]. So alſo corporations, religious or others, may purchaſe lands; yet, unleſs they have a licence to hold in mortmain, they cannot retain ſuch purchaſe; but it ſhall be forfeited to the lord of the fee.

IDIOTS and perſons of nonſane memory, infants, and perſons under dureſs, are not totally diſabled either to convey or purchaſe, but *ſub modo* only. For their conveyances and purchaſes are voidable, but not actually void. The king indeed, on behalf of an idiot, may avoid his grants or other acts [x]. But it hath been ſaid, that a *non compos* himſelf, though he be afterwards brought to a right mind, ſhall not be permitted to allege his own inſanity in order to avoid ſuch grant: for that no man ſhall be allowed to ſtultify himſelf, or plead his own diſability. The progreſs of this notion is ſomewhat curious. In the time of Edward I, *non compos* was a ſufficient plea to avoid a man's own bond [y]: and there is a writ in the regiſter [z] for the alienor himſelf to recover

[t] Sheppard's touchſtone. 238, 239. 322. 11 Mod. 152. 1 P. Wms. 574. Stra. 132.

[u] Co. Litt. 42.

[w] *Ibid.* 2.

[x] *Ibid.* 247.

[y] Britton. c. 28. *fol.* 66.

[z] *fol.* 228. See alſo *Memorand. Scacch.* 22 *Edw.* I. (prefixed to Maynard's year-book Edw. II.) *fol.* 23.

(1) A covenant for a valuable conſideration to ſettle or convey a poſſibility, when it ariſes, will be enforced in equity. *Fonbl. Tr. of Eq.* 202.

 lands

lands aliened by him during his insanity; *dum fuit non compos mentis suae, ut dicit, &c.* But under Edward III a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own insanity[z]: and, afterwards, a defendant in assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assise; doubting, whether as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it[a]. Under Henry VI this way of reasoning (that a man shall not be allowed to disable himself, [292] by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument[b]; upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason[c], the maxim that a man shall not stultify himself hath been handed down as settled law[d]: though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it[e] (2). And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant[f]. And so too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to

[z] 5 *Edw. III.* 70.
[a] 35 *Assis. pl.* 10.
[b] 39 *Hen. VI.* 42.
[c] F. N. B. 202.
[d] Litt. § 405. Cro. Eliz. 398. 4 Rep. 123. Jenk. 40.
[e] Comb. 469. 3 Mod. 310, 311. 1 Equ. cas. abr. 279.
[f] Perkins. § 21.

(2) In Cro. Eliz. 398. the opinion of Fitzherbert is denied to be law, and *de non sane memory* held to be a bad plea to an action of debt upon an obligation. See much learning respecting lunatics, collected in Mr. Fonblanque's edition of the Treatise of Equity, p. 40, & seq.

the purchaſe, his heir may either waive or accept the eſtate at his option [g]. In like manner, an infant may waive ſuch purchaſe or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him [h]. Perſons alſo, who purchaſe or convey under dureſs, may affirm or avoid ſuch tranſaction, whenever the dureſs is ceaſed [i]. For all theſe are under the protection of the law; which will not ſuffer them to be impoſed upon, through the imbecillity of their preſent condition; ſo that their acts are only binding, in caſe they be afterwards agreed to, when ſuch imbecillity ceaſes. Yet the guardians or committees of a lunatic, by the ſtatute of 11 Geo. III. c. 20. are impowered to renew in his right, under the directions of the court of chancery, any leaſe for lives or years, and apply the profits of ſuch renewal for the benefit of ſuch lunatic, his heirs, or executors.

THE caſe of a feme-covert is ſomewhat different. She may *purchaſe* an eſtate without the conſent of her huſband, and the conveyance is good during the coverture, till he avoids
[293] it by ſome act declaring his diſſent [k]. And, though he does nothing to avoid it, or even if he actually conſents, the feme-covert herſelf may, after the death of her huſband, waive or diſagree to the ſame: nay, even her heirs may waive it after her, if ſhe dies before her huſband, or if in her widowhood ſhe does nothing to expreſs her conſent or agreement [l]. But the *conveyance* or other contract of a feme-covert (except by ſome matter of record) is abſolutely void, and not merely voidable [m]; and therefore cannot be affirmed or made good by any ſubſequent agreement.

THE caſe of an alien born is alſo peculiar. For he may purchaſe any thing; but after purchaſe he can *hold* nothing except a leaſe for years of a houſe for convenience of mer-

g Co. Litt. 2.
h *Ibid.*
i 2 Inſt. 483. 5 Rep. 119.
k Co. Litt. 3.
l *Ibid.*
m Perkins. § 154. 1 Sid. 120.

chandize,

chandize (3), in case he be an alien friend: all other purchases (when found by an inquest of office) being immediately forfeited to the king [n].

PAPISTS, lastly, and persons professing the popish religion, and neglecting to take the oath prescribed by statute 18 Geo. III. c. 60. within the time limited for that purpose, are by statute 11 & 12 W. III. c. 4. disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void [o].

II. WE are next, but principally, to inquire, *how* a man may aliene or convey; which will lead us to consider the several modes of conveyance.

IN consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; [294] which, we have more than once observed, was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seised, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose therefore, of continuing the possession, the municipal law has established *descents* and *alienations*: the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons, to whom the proprietor, by his own *voluntary* act, should choose to relinquish it in his life-time. A translation, or transfer, of property being

n Co. Litt. 2. o 1 P. Wms. 354.

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(3) It seems that he has not even this exception in his favour. *Harg. Co. Litt.* 2.

thus admitted by law, it became neceſſary that this transfer ſhould be properly evidenced: in order to prevent diſputes, either about the fact, as whether there was any transfer at all: or concerning the perſons, by whom and to whom it was transferred; or with regard to the ſubject matter, as what the thing transferred conſiſted of; or, laſtly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what eſtate and intereſt) the conveyance was made. The legal evidences of this tranſlation of property are called the *common aſſurances* of the kingdom; whereby every man's eſtate is aſſured to him, and all controverſies, doubts, and difficulties are either prevented or removed.

THESE common aſſurances are of four kinds: 1. By matter *in pais*, or deed; which is an aſſurance tranſacted between two or more private perſons *in pais*, in the country; that is (according to the old common law) upon the very ſpot to be transferred. 2. By matter of *record*, or an aſſurance tranſacted only in the king's public courts of record. 3. By ſpecial *cuſtom*, obtaining in ſome particular places, and relating only to ſome particular ſpecies of property. Which three are ſuch as take effect during the life of the party conveying or aſſuring. 4. The fourth takes no effect, till after his death; and that is by *deviſe*, contained in his laſt will and teſtament. We ſhall treat of each in it's order.

CHAPTER THE TWENTIETH.

OF ALIENATION BY DEED.

IN treating of deeds I ſhall conſider, firſt, their general nature; and, next, the ſeveral ſorts or kinds of deeds, with their reſpective incidents. And in explaining the former, I ſhall examine, firſt, what a deed is; ſecondly, it's requiſites; and thirdly, how it may be avoided.

I. FIRST then, a deed is a writing ſealed and delivered by the parties [a]. It is ſometimes called a charter, *carta*, from it's materials; but moſt uſually, when applied to the tranſactions of private ſubjects, it is called a deed, in Latin *factum*, *κατ' ἐξοχην*, becauſe it is the moſt ſolemn and authentic act that a man can poſſibly perform, with relation to the diſpoſal of his property; and therefore a man ſhall always be *eſtopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once ſo ſolemnly and deliberately avowed [b]. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each ſhould be cut or indented (formerly in acute angles *inſtar dentium*, like the teeth of a ſaw, but at preſent in a waving line) on the top or ſide, to tally or correſpond with the other; which deed, ſo made, is called an indenture. Formerly, when deeds were more conciſe than at preſent, it was uſual to write both parts on the ſame piece of parchment, with ſome word or letters of the alphabet written between them; through which the parchment was cut, either in a ſtrait or

[a] Co. Litt. 171. [b] Plowd. 434.

indented line, in ſuch a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *ſyngrapha* by the canoniſts[c]; and with us *chirographa*, or hand-writings[d]; the word *cirographum* or *cyrographum* being uſually that which is divided in making the indenture: and this cuſtom is ſtill preſerved in making out the indentures of a fine, whereof hereafter. But at length indenting only has come into uſe, without cutting through any letters at all; and it ſeems at preſent to ſerve for little other purpoſe, than to give name to the ſpecies of the deed. When the ſeveral parts of an indenture are interchangeably executed by the ſeveral parties, that part or copy which is executed by the grantor is uſually called the *original*, and the reſt are *counterparts*: though of late it is moſt frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but *polled* or ſhaved quite even; and therefore called a *deed-poll*, or a ſingle deed[e].

II. WE are in the next place to conſider the *requiſites* of a deed. The firſt of which is, that there be perſons able to contract and be contracted with, for the purpoſes intended by the deed; and alſo a thing, or ſubject matter to be contracted for; all which muſt be expreſſed by ſufficient names[f]. So as in every grant there muſt be a grantor, a grantee, and a thing granted; in every leaſe a leſſor, a leſſee, and a thing demiſed.

SECONDLY; the deed muſt be founded upon good and ſufficient *conſideration*. Not upon an uſurious contract[g]; nor upon fraud or colluſion, either to deceive purchaſors *bona fide*[h], or juſt and lawful creditors[i]; any of which bad conſiderations will vacate the deed, and ſubject ſuch perſons, as put the ſame in ure, to forfeitures, and often to impriſonment. A deed alſo, or other grant, made without any conſideration, is, as it were, of no effect; for it is conſtrued to inure, or to

c Lyndew. *l.* 1. *t.* 10. *c.* 1.
d Mirror. *c.* 2. § 27.
e *Ibid.* Litt. § 371, 372.
f Co. Litt. 35.
g Stat. 13 Eliz. c. 8.
h Stat. 27 Eliz. c. 4.
i Stat. 13 Eliz. c. 5.

3 is,

be effectual, only to the uſe of the grantor himſelf [k] (1). The conſideration may be either a *good* or a *valuable* one. A good [297] conſideration is ſuch as that of blood, or of natural love and affection, when a man grants an eſtate to a near relation; being founded on motives of generoſity, prudence, and natural duty; a valuable conſideration is ſuch as money, marriage, or the like, which the law eſteems an equivalent given for the grant [l]; and is therefore founded in motives of juſtice. Deeds made upon good conſideration only, are conſidered as merely voluntary, and are frequently ſet aſide in favour of creditors, and *bona fide* purchaſors.

THIRDLY; the deed muſt be *written*, or I preſume *printed*, for it may be in any character or any language; but it muſt be upon paper or parchment. For if it be written on ſtone, board, linen, leather, or the like, it is no deed [m]. Wood or ſtone may be more durable, and linen leſs liable to

k Perk. § 533.
l 3 Rep. 83.
m Co. Litt. 229. F. N. B. 122.

(1) This I conceive is only true of a bargain and ſale; for "herein it is ſaid to differ from a gift, that this may be without any conſideration or cauſe at all; and that hath always ſome meritorious cauſe moving it, and cannot be without it." *Shep. Touch.* 221. But otherwiſe a voluntary conveyance is good both in law and equity. *Tr. of Eq. b.* 1. *c.* 5. *ſ.* 2. It uſed to be thought, if a perſon made a voluntary grant of lands, although he could not reſume them himſelf, yet if he afterwards made another conveyance of them for a valuable conſideration, that the firſt grant would be void with regard to this purchaſor under the 27 Eliz. c. 4. But it was determined by lord Mansfield and the court, that there muſt be ſome circumſtance of fraud to vacate the firſt conveyance, the want of conſideration alone not being ſufficient. *Cowp.* 705.

But if a perſon is indebted at the time of making a voluntary grant, or becomes ſo ſoon afterwards, it will be conſidered fraudulent and void with reſpect to creditors, under the 13 Eliz. c. 5.

And if a perſon makes a voluntary grant and afterwards becomes bankrupt, whether he was indebted or not at the time, it will be void by 1 Jac. c. 15; and the eſtate granted may be conveyed by the commiſſioners to the aſſignees for the benefit of the creditors. 1 *Atk.* 93.

rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps, imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29 Car. II. c. 3. enacts, that no lease estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value) shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

FOURTHLY; the matter written must be *legally* and *orderly* set forth: that is, there must be words sufficient to specify the agreement and bind the parties: which suffici-
[298] ency must be left to the courts of law to determine[n]. For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual[o] order.

1. THE *premises* may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements,

[n] Co. Litt. 225.

[o] *Ibid.* 6.

or

or matters of fact, as are neceſſary to explain the reaſons upon which the preſent tranſaction is founded: and herein alſo is ſet down the conſideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted [p].

2, 3. NEXT come the *habendum* and *tenendum* [q]. The office of the *habendum* is properly to determine what eſtate or intereſt is granted by the deed: though this may be performed, and ſometimes is performed, in the premiſes. In which caſe the *habendum* may leſſen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the eſtate granted in the premiſes. As if a grant be "to A and "the heirs of his body," in the premiſes, *habendum* "to him "and his heirs for ever," or *vice verſa*; here A has an eſtate-tail, and a fee-ſimple expectant thereon [r]. But, had it been in the premiſes "to him and his heirs," *habendum* "to him "for life," the *habendum* would be utterly void [s]; for an eſtate of inheritance is veſted in him before the *habendum* comes, and ſhall not afterwards be taken away, or deveſted, by it. The *tenendum* "and to hold," is now of very little uſe, and is only kept in by cuſtom. It was ſometimes formerly uſed to ſignify the tenure, by which the eſtate granted was to be holden; *viz.* "*tenendum per ſervitium militare, in* "*burgagio, in libero ſocagio, &c.*" But, all theſe being now reduced to free and common ſocage, the tenure is never ſpecified. Before the ſtatute of *quia emptores*, 18 Edw. I. it was alſo ſometimes uſed to denote the lord of whom the land ſhould be holden: but that ſtatute directing all future purchaſors to hold, not of the immediate grantor, but of the chief lord of the fee, this uſe of the *tenendum* hath been alſo antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements ſhall be holden *de capitalibus dominis feodi* [t]; but as this expreſſed nothing more than the ſtatute had already provided for, it gradually grew out of uſe. [299]

p See appendix, N° II. § 2. pag. v.

q *Ibid.*

r Co. Litt. 21. 2 Roll. Rep. 19. 23. Cro. Jac. 476.

s 2 Rep. 23. 8 Rep. 56.

t Append. N° I. Madox. *Formul. paſſim.*

4. NEXT

4. NEXT follow the terms of ſtipulation, if any, upon which the grant is made: the firſt of which is the *reddendum* or reſervation, whereby the grantor doth create or reſerve ſome new thing to himſelf out of what he had before granted As "rendering therefore yearly the ſum of ten ſhillings, or "a pepper corn, or two days ploughing, or the like[u]." Under the pure feodal ſyſtem, this render, *reditus*, return, or rent, conſiſted in chivalry principally of military ſervices; in villenage, of the moſt ſlaviſh offices; and in ſocage, it uſually conſiſts of money, though it may ſtill conſiſt of ſervices, or of any other certain profit[w]. To make a *reddendum* good, if it be of any thing newly created by the deed, the reſervation muſt be to the grantors, or ſome, or one of them, and not to any ſtranger to the deed[x]. But if it be of ancient ſervices or the like, annexed to the land, then the reſervation may be to the lord of the fee[y].

5. ANOTHER of the terms upon which a grant may be made is a *condition;* which is a clauſe of contingency, on the
[300] happening of which the eſtate granted may be defeated; as "provided always, that if the mortgagor ſhall pay the mort-"gagee 500 *l.* upon ſuch a day, the whole eſtate granted "ſhall determine;" and the like[z].

6. NEXT may follow the clauſe of *warranty;* whereby the grantor doth, for himſelf and his heirs, warrant and ſecure to the grantee the eſtate ſo granted[a]. By the feodal conſtitution, if the vaſal's title to enjoy the feud was diſputed, he might vouch, or call the lord or donor, to warrant or inſure his gift; which if he failed to do, and the vaſal was evicted, the lord was bound to give him another feud of equal value in recompenſe[b]. And ſo, by our antient law, if before the ſtatute of *quia emptores* a man enfeoffed another in fee, by the feodal verb *dedi*, to hold of himſelf and his heirs by certain ſervices; the law annexed a warranty to this

[u] Append. No. II. § 1. pag. iii.
[w] See pag. 41.
[x] Plowd. 13. 8 Rep. 71.
[y] Append. No. I. pag. i.
[z] Append. No. II. § 2. pag. viii.
[a] *Ibid.* No. I. pag. i.
[b] *Feud. l.* 2. *t.* 8, & 25.

grant,

grant, which bound the feoffor and his heirs, to whom the fervices (which were the confideration and equivalent for the gift) were originally ftipulated to be rendered [c]. Or if a man and his anceftors had immemorially holden land of another and his anceftors by the fervice of homage (which was called *homage aunceftrel*) this alfo bound the lord to warranty [d]; the homage being an evidence of fuch a feodal grant. And, upon a fimilar principle, in cafe, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his fhare, the other and his heirs are bound to warranty [e], becaufe they enjoy the equivalent. And fo, even at this day, upon a gift in tail or leafe for life, rendering rent, the donor or leffor and his heirs (to whom the rent is payable) are bound to warrant the title [f]. But in a feoffment in fee by the verb *dedi*, fince the ftatute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs [g]; becaufe it is a mere perfonal contract on the part of the feoffor, the tenure (and of courfe the antient fervices) refulting back to the fuperior lord of the fee. And in other forms of alienation, gradually introduced fince that ftatute, no warranty whatfoever is implied [h]; they bearing no fort of [301] analogy to the original feodal donation. And therefore in fuch cafes it became neceffary to add an exprefs claufe of warranty to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant* [i].

THESE exprefs warranties were introduced, even prior to the ftatute of *quia emptores*, in order to evade the ftrictnefs of the feodal doctrine of non-alienation without the confent of the heir. For, though he, at the death of his anceftor, might have entered on any tenements that were aliened without his concurrence, yet, if a claufe of warranty was added to the anceftor's grant, this covenant defcending upon the heir in-

c Co. Litt. 384.
d Litt. § 143.
e Co. Litt. 174.
f *Ibid.* 384.
g *Ibid.*
h Co. Litt. 102.
i Litt. § 733.

fured

ſured the grantee; not ſo much by confirming his title, as by obliging ſuch heir to yield him a recompenſe in lands of equal value: the law, in favour of alienations, ſuppoſing that no anceſtor would wantonly diſinherit his next of blood[k]; and therefore preſuming that he had received a valuable conſideration, either in land, or in money which had purchaſed land, and that this equivalent deſcended to the heir together with the anceſtor's warranty. So that when either an anceſtor, being the rightful tenant of the freehold, conveyed the land to a ſtranger and his heirs, or releaſed the right in fee-ſimple to one who was already in poſſeſſion, and ſuperadded a warranty to his deed, it was held that ſuch warranty not only bound the warrantor himſelf to protect and aſſure the title of the warrantee, but it alſo bound his heir: and this, whether that warranty was *lineal*, or *collateral* to the title of the land. *Lineal* warranty was, where the heir derived, or might by poſſibility have derived, his title to the land warranted, either from or through the anceſtor who made the warranty: as where a father, or an elder ſon in the life of the father, releaſed to the diſſeiſor of either themſelves or the grandfather, with warranty, this was lineal to the younger ſon[l]. *Collateral* warranty was where the heir's title to the land neither was, nor
[302] could have been, derived from the warranting anceſtor; as where a younger brother releaſed to his father's diſſeiſor, with warranty, this was collateral to the elder brother[m]. But where the very conveyance to which the warranty was annexed, immediately followed a diſſeiſin, or operated itſelf as ſuch, (as, where a father tenant for years, with remainder to his ſon in fee, aliened in fee-ſimple with warranty) this, being in it's original manifeſtly founded on the *tort* or wrong of the warrantor himſelf, was called a warranty *commencing by diſſeiſin*; and, being too palpably injurious to be ſupported, was not binding upon any heir of ſuch tortious warrantor[n].

IN both lineal and collateral warranty, the obligation of the heir (in caſe the warrantee was evicted, to yield him other

[k] Co. Litt. 373.

[l] Litt. § 703. 706, 707.

[m] Litt. § 705. 707.

[n] *Ibid.* § 698. 702.

lands

lands in their ſtead) was only on condition that he had other ſufficient lands by deſcent from the warranting anceſtor [o]. But though, without aſſets, he was not bound to inſure the title of *another*, yet in caſe of lineal warranty, whether aſſets deſcended or not, the heir was perpetually barred from claiming the land *himſelf*; for, if he could ſucceed in ſuch claim, he would then gain aſſets by deſcent, (if he had them not before) and muſt fulfil the warranty of his anceſtor: and the ſame rule [p] was with leſs juſtice adopted alſo in reſpect of collateral warranties, which likewiſe (though no aſſets deſcended) barred the heir of the warrantor from claiming the land by any collateral title; upon the preſumption of law that he might hereafter have aſſets by deſcent either from or through the ſame anceſtor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curteſy took upon them to aliene their lands with warranty; which collateral warranty of the father deſcending upon his ſon (who was the heir of both his parents) barred him from claiming his maternal inheritance: to remedy which the ſtatute of Glouceſter, 6 Edw. I. c. 3. declared, that ſuch warranty ſhould be no bar to the ſon, unleſs aſſets deſcended from the father. It was afterwards attempted in 50 Edw. III. [303] to make the ſame proviſion univerſal, by enacting that no collateral warranty ſhould be a bar, unleſs where aſſets deſcended from the ſame anceſtor [q]; but it then proceeded not to effect. However, by the ſtatute 11 Hen. VII. c. 20. notwithſtanding any alienation with warranty by tenant in dower, the heir of the huſband is not barred, though he be alſo heir to the wife. And by ſtatute 4 & 5 Ann. c. 16. all warranties by any tenant for life ſhall be void againſt thoſe in remainder or reverſion; and all collateral warranties by any anceſtor who has no eſtate of inheritance in poſſeſſion ſhall be void againſt his heir. By the wording of which laſt ſtatute it ſhould ſeem, that the legiſlature meant to allow, that the collateral warranty of tenant in tail in poſſeſſion, deſcending (though without aſſets) upon a remainder-man

[o] Co. Litt. 102.

[p] Litt. § 711, 712.

[q] Co. Litt. 373.

or reverſioner, ſhould ſtill bar the remainder or reverſion. For though the judges, in expounding the ſtatute *de donis*, held that, by analogy to the ſtatute of Glouceſter, a lineal warranty by the tenant in tail without aſſets ſhould not bar the iſſue in tail, yet they held ſuch warranty with aſſets to be a ſufficient bar [r]: which was therefore formerly mentioned [s] as one of the ways whereby an eſtate-tail might be deſtroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. They alſo held, that collateral warranty was not within the ſtatute *de donis*; as that act was principally intended to prevent the tenant in tail from diſinheriting his own iſſue: and therefore collateral warranty (though without aſſets) was allowed to be, as at common law, a ſufficient bar of the eſtate tail and all remainders and reverſions expectant thereon [t]. And ſo it ſtill continues to be, notwithſtanding the ſtatute of queen Anne, if made by tenant in tail in poſſeſſion: who therefore may now, without the forms of a fine or recovery, in ſome caſes make a good conveyance in fee-ſimple, by ſuperadding a warranty to his grant; which, if accompanied with aſſets, bars his own iſſue, and without them bars ſuch of his heirs as may be in remainder or reverſion.

[304] 7. AFTER warranty uſually follow *covenants*, or conventions, which are clauſes of agreement contained in a deed, whereby either party may ſtipulate for the truth of certain facts, or may bind himſelf to perform, or give, ſomething to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like; the grantee may covenant to pay his rent, or keep the premiſes in repair, *&c* [u]. If the covenantor covenants for himſelf and his *heirs*, it is then a covenant real, and deſcends upon the heirs; who are bound to perform it, provided they have aſſets by deſcent, but not otherwiſe: if he covenants alſo for his *executors* and *adminiſtrators*, his perſonal aſſets, as well as his real, are likewiſe pledged for the performance of the covenant; which

r Litt. § 712. 2 Inſt. 293.
s pag. 116.
t Co. Litt. 374. 2 Inſt. 335.
u Append. N° II. § 2. pag. viii.

makes

makes ſuch covenant a better ſecurity than any warranty (2). It is alſo in ſome reſpects a leſs ſecurity, and therefore more beneficial to the grantor; who uſually *covenants* only for the acts of himſelf and his anceſtors, whereas a general *warranty* extends to all mankind. For which reaſons the covenant has in modern practice totally ſuperſeded the other.

8. LASTLY, comes the *concluſion*, which mentions the execution and date of the deed, or the time of it's being given or executed, either expreſsly, or by reference to ſome day and year before-mentioned[w]. Not but a deed is good, although it mention no date: or hath a falſe date; or even if it hath an impoſſible date, as the thirtieth of February; provided the real day of it's being dated or given, that is delivered, can be proved[x].

I PROCEED now to the *fifth* requiſite for making a good deed; the *reading* of it. This is neceſſary, wherever any of the parties deſire it; and, if it be not done on his requeſt, the deed is void as to him. If he can, he ſhould read it himſelf: if he be blind or illiterate, another muſt read it to him. If it be read falſely, it will be void; at leaſt for ſo much as is miſrecited: unleſs it be agreed by colluſion that the deed ſhall be read falſe, on purpoſe to make it void; for in ſuch caſe it ſhall bind the fraudulent party[y].

SIXTHLY, it is requiſite that the party, whoſe deed it is, [305] ſhould *ſeal*, and now in moſt caſes I apprehend ſhould *ſign* it alſo. The uſe of ſeals, as a mark of authenticity to letters and other inſtruments in writing, is extremely antient. We read of it among the Jews and Perſians in the earlieſt and moſt ſacred records of hiſtory[z]. And in the book of Jeremiah there is a very remarkable inſtance, not only of an atteſtation by ſeal, but alſo of the other uſual formalities attending a Jewiſh purchaſe[a]. In

w Append. N°. II. § 2. pag. xii.
x Co. Litt. 46. Dyer. 28.
y 2 Rep. 3. 9. 11 Rep. 27.
z 1 Kings. c. 21. Daniel. c. 6. Eſther. c. 8.

a "And I bought the field of Hanameel, and weighed him the money, "even ſeventeen ſhekels of ſilver. And "I ſubſcribed the evidence, and ſealed "it and took witneſſes, and weighed "him

(2) The executors and adminiſtrators are bound by every covenant without being named, unleſs it is ſuch a covenant as is to be performed perſonally by the covenantor, and there has been no breach before his death. *Cro. Eliz.* 553.

the civil law also [b], seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England. For though sir Edward Coke [c] relies on an instance of king Edwin's making use of a seal about an hundred years before the conquest, yet it does not follow that this was the usage among the whole nation : and perhaps the charter he mentions may be of doubtful authority, from this very circumstance, of being sealed ; since we are assured by all our antient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross : which custom our illiterate vulgar do, for the most part, to this day keep up; by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in it's stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters [d]. In like manner, and for the same unsurmountable reason, the Normans, a brave but
[306] illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made it's way among them, though the reason for doing it had ceased ; and hence the charter of Edward the confessor to Westminster abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England [e]. At the conquest, the Norman lords brought over into this kingdom their own fashions ; and introduced waxen seals only, instead of the English method of writing their names, and signing with the

"him the money in the ballances. And "I took the evidence of the purchase, "both that which was sealed according "to the law and custom, and also that "which was open." c. 32.

[b] *Inst.* 2. 10. 2 & 3.

[c] 1 *Inst.* 7.

[d] "*Propria manu pro ignorantia literarum signum sanctae crucis expressi* "*et subscripsi.*" Seld. *Jan. Ang.* l. 1. § 42. And this (according to Procopius) the emperor Justin in the east, and Theodoric king of the Goths in Italy, had before authorized by their example, on account of their inability to write.

[e] Lamb. *Archeion.* 51.

sign

sign of the cross[f]. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals[g] The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the first, who brought them from the croisade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

THIS neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds,— "*sealed* and delivered," continues to this day; notwithstanding the statute 29 Car. II. c. 3. before-mentioned revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds: in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other[h].

A SEVENTH requisite to a good deed is that it be *delivered*, by the party himself or his certain attorney, which therefore is also expressed in the attestation; "sealed and *delivered*." A [307]
deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing[j], and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which

f "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in ceram impressam mutant; modumque scribendi Anglicum rejiciunt.*" Ingulph.

g Stat. Exon. 14 Edw. I.

h 3 Lev. 1. Stra. 764.

j Perk. § 130.

last case it is not delivered as a *deed*, but as an *escrow;* that is, as a scrowl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes [i].

THE *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses:* though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feodal writers [k]; which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power) but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum; thus: "*hijs testibus* "*Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis* [l]." This, like all other solemn transactions, was originally done only *coram paribus* [m], and frequently when assembled in the court baron, hundred, or county court; which was then expressed in the attestation, *teste comitatu, hundredo, &c* [n]. Afterwards the attestation of other witnesses was allowed, the trial in
[308] case of a dispute being still reserved to the *pares;* with whom the witnesses (if more than one) were associated and joined in the verdict [o]; till that also was abrogated by the statute of York, 12 Edw. II. st. 1. c. 2. And in this manner, with some such clause of *hijs testibus*, are all old deeds and charters, particularly *magna carta*, witnessed. And in the time of sir Edward Coke, creations of nobility were still witnessed in the same manner [p]. But in the king's common charters, writs, or letters patent, the stile is now altered: for at present the king is his own witness, and attests his letters patent

[i] Co. Litt. 36.
[k] *Feud. l.* 1. *t.* 4.
[l] Co. Litt. 7.
[m] *Feud. l.* 2. *t.* 32.
[n] Spelm. *Gloss.* 228. Madox. *Formul.* nº. 221. 322. 660.
[o] Co. Litt. 6.
[p] 2 Inst. 77.

thus;

thus: "*teste meipse*, witness ourself at Westminster, *&c.*" a form which was introduced by Richard the first [q], but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijs testibus* entirely discontinued till the reign of Henry the eighth [r]: which was also the æra of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed [s].

III. WE are next to consider, how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before-mentioned; either, 1. Proper parties, and a proper subject matter: 2. A good and sufficient consideration: 3. Writing, on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and, by the statute, in most cases signing also: or, 7. Delivery; it is a void deed *ab initio*. It may also be avoided by matter *ex post facto*: as, 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation [t]. 2. By breaking off, or defacing the seal [u]. 3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of lattice [309] work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as the husband, where a feme-covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like. 5. By the judgment or decree of a court of judicature. This was antiently the province of the court of star chamber, and now of the chancery: when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute

q Madox. *Formul.* n°. 515.

r *Ibid.* Differt. fol. 32.

s 2 Inst. 78. See page 378.

t 11 Rep. 27.

u 5 Rep. 23.

 forgery.

forgery [w]. In any of theſe caſes the deed may be voided, either in part or totally, according as the cauſe of avoidance is more or leſs extenſive.

AND, having thus explained the general nature of deeds, we are next to conſider their ſeveral ſpecies, together with their reſpective incidents. And herein I ſhall only examine the particulars of thoſe, which, from long practice and experience of their efficacy, are generally uſed in the alienation of *real* eſtates: for it would be tedious, nay infinite, to deſcant upon all the ſeveral inſtruments made uſe of in *perſonal* concerns, but which fall under our general definition of a deed; that is, a writing ſealed and delivered. The former, being principally ſuch as ſerve to *convey* the property of lands and tenements from man to man, are commonly denominated *conveyances:* which are either conveyances at *common law*, or ſuch as receive their force and efficacy by virtue of the *ſtatute of uſes*.

I. OF conveyances by the common law, ſome may be called *original*, or *primary* conveyances; which are thoſe by means whereof the benefit or eſtate is created or firſt ariſes: others are *derivative*, or *ſecondary;* whereby the benefit or eſtate, originally created, is enlarged, reſtrained, transferred, or extinguiſhed.

[310] ORIGINAL conveyances are the following; 1. Feoffment; 2. Gift; 3. Grant; 4. Leaſe; 5. Exchange; 6. Partition: *derivative* are, 7. Releaſe; 8. Confirmation; 9. Surrender; 10. Aſſignment; 11. Defeazance.

1. A FEOFFMENT, *feoffamentum*, is a ſubſtantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi* [x]. It is the moſt antient method of conveyance, the moſt ſolemn and public, and therefore the moſt eaſily remembered and proved. And it may properly be defined, the gift of any cor-

[w] Toth. *numo.* 24. 1 Vern. 348.

[x] Co. Litt. 9.

poreal

poreal hereditament to another. He that ſo gives, or enfeoffs, is called the *feoffor*; and the perſon enfeoffed is denominated the *feoffee*.

THIS is plainly derived from, or is indeed itſelf the very mode of the antient feodal donation; for though it may be performed by the word, "*enfeoff*" or "grant," yet the apteſt word of feoffment is, "*do* or *dedi*[y]." And it is ſtill directed and governed by the ſame feodal rules; inſomuch that the principal rule relating to the extent and effect of the feodal grant, "*tenor eſt qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*[z]." And therefore as in pure feodal donations the lord, from whom the feud moved, muſt expreſsly limit and declare the continuance or quantity of eſtate which he meant to confer, "*ne quis plus donaſſe praeſumatur, quam in donatione expreſſerit*[a];" ſo, if one grants by feoffment lands or tenements to another, and limits or expreſſes no eſtate, the grantee (due ceremonies of law being performed) hath barely an eſtate for life[b]. For as the perſonal abilities of the feoffee were originally preſumed to be the immediate or principal inducements to the feoffment, the feoffee's eſtate ought to be confined to his perſon and ſubſiſt only for his life; unleſs the feoffor, by expreſs proviſion in the creation and conſtitution of the eſtate, hath [311] given it a longer continuance. Theſe expreſs proviſions are indeed generally made; for this was for ages the only conveyance, whereby our anceſtors were wont to create an eſtate in fee-ſimple[c], by giving the land to the feoffee, to hold to him and his heirs for ever; though it ſerves equally well to convey any other eſtate or freehold[d].

BUT by the mere words of the deed the feoffment is by no means perfected, there remains a very material ceremony to be performed, called *livery of ſeiſin*; without which the feof-

y Co. Litt. 9.
z Wright. 21.
a pag. 108.
b Co. Litt. 42.
c See Appendix. No. I.
d Co. Litt. 9.

fee has but a mere eſtate at will[e]. This livery of ſeiſin is no other than the pure feodal inveſtiture, or delivery of corporeal poſſeſſion of the land or tenement; which was held abſolutely neceſſary to complete the donation. "*Nam feudum* "*ſine inveſtitura nullo modo conſtitui potuit*[f]:" and an eſtate was then only perfect, when, as the author of Fleta expreſſes it in our law, "*fit juris et ſeiſinae conjunctio*[g]."

INVESTITURES, in their original riſe, were probably intended to demonſtrate in conquered countries the actual poſſeſſion of the *lord*; and that he did not grant a bare litigious right, which the ſoldier was ill qualified to proſecute, but a peaceable and firm poſſeſſion. And at a time when writing was ſeldom practiſed, a mere oral gift, at a diſtance from the ſpot that was given, was not likely to be either long or accurately retained in the memory of by-ſtanders, who were very little intereſted in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and teſtify the transfer of the eſtate: and that ſuch, as claimed title by other means, might know againſt whom to bring their actions.

IN all well-governed nations, ſome notoriety of this kind has been ever held requiſite, in order to acquire and aſcertain
[312] the property of lands. In the Roman law *plenum dominium* was not ſaid to ſubſiſt, unleſs where a man had both the *right* and the *corporal poſſeſſion*; which poſſeſſion could not be acquired without both an actual intention to poſſeſs, and an actual ſeiſin, or entry into the premiſes, or part of them, in the name of the whole[h]. And even in eccleſiaſtical promotions where the freehold paſſes to the perſon promoted, corporal poſſeſſion is required at this day, to veſt the property completely in the new proprietor; who, according to the

e Litt. § 66.
f Wright. 37.
g *l.* 3. *c.* 15. § 5.
h *Nam apiſcimur poſſeſſionem corpore et animo; neque per ſe corpore, neque per ſe animo. Non autem ita accipiendum eſt, ut qui fundum poſſidere velit, omnes glebas circumambulet; ſed ſufficit quamlibet partem ejus fundi introire.* (*Ff.* 41, 2, 3.) And again: *traditionibus dominia rerum, non nudis pactis, transferuntur.* (*Cod.* 2, 3. 20.)

distinction

distinction of the canonists[i], acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by installment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands: for if he dies before *entry* made, *his* heir shall not be entitled to take the possession, but the heir of the person who was last actually seised[k]. It is not therefore only a mere right to enter, but the actual entry, that makes a man complete owner; so as to transmit the inheritance to his own heirs: *non jus, sed seisina, facit stipitem*[l].

YET, the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases antiently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. [313] Among the Jews we find the evidence of a purchase thus defined in the book of Ruth[m]: "now this was the manner in former time in Israel, concerning redeeming and concerning "changing, for to confirm all things: a man plucked off "his shoe, and gave it to his neighbour; and this was a testimony in Israel." Among the antient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the wit-

i Decretal. *l.* 3. *t.* 4. *c.* 40.

k See pag. 209. 227, 228.

l Flet. *l.* 6. *c.* 2. § 2.

m ch. 4. v. 7.

nesses.

neſſes[n]. With our Saxon anceſtors the delivery of a turf was a neceſſary ſolemnity, to eſtabliſh the conveyance of lands[o]. And, to this day, the conveyance of our copyhold eſtates is uſually made from the ſeller to the lord or his ſteward by delivery of a rod or verge, and then from the lord to the purchaſor by re-delivery of the ſame, in the preſence of a jury of tenants.

CONVEYANCES in writing were the laſt and moſt refined improvement. The mere delivery of poſſeſſion, either actual or ſymbolical, depending on the ocular teſtimony and remembrance of the witneſſes, was liable to be forgotten or miſrepreſented, and became frequently incapable of proof. Beſides, the new occaſions and neceſſities, introduced by the advancement of commerce, required means to be deviſed of charging and incumbering eſtates, and of making them liable to a multitude of conditions and minute deſignations for the purpoſes of raiſing money, without an abſolute ſale of the land; and ſometimes the like proceedings were found uſeful in order to make a decent and competent proviſion for the numerous branches of a family, and for other domeſtic views. None of which could be effected by a mere, ſimple, corporal transfer of the ſoil from one man to another, which was principally calcu-
[314] lated for conveying an abſolute unlimited dominion. Written deeds were therefore introduced, in order to ſpecify and perpetuate the peculiar purpoſes of the party who conveyed: yet ſtill, for a very long ſeries of years, they were never made uſe of, but in company with the more antient and notorious method of transfer, by delivery of corporal poſſeſſion.

LIVERY of ſeiſin, by the common law, is neceſſary to be made upon every grant of an eſtate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impoſſible to be made; for they are not the object of the ſenſes: and in leaſes for years, or other chattel intereſts, it is not neceſſary. In

n Stiernhook. *de jure Sueon. l.* 2. *c.* 4.

o Hickes *Diſſert. Epiſtolar.* 85.

leafes for years indeed an actual *entry* is neceffary, to veft the eftate in the leffee: for the bare leafe gives him only a right to enter, which is called his intereft in the term, or *interesse termini*: and, when he enters in purfuance of that right, he is then and not before in poffeffion of his term, and complete tenant for years [p]. This entry by the tenant himfelf ferves the purpofe of notoriety, as well as livery of feifin from the grantor could have done; which it would have been improper to have given in this cafe, becaufe that folemnity is appropriated to the conveyance of a freehold. And this is one reafon why freeholds cannot be made to commence *in futuro*, becaufe they cannot (at the common law) be made but by livery of feifin; which livery, being an actual manual tradition of the land, muft take effect *in praesenti*, or not at all [q].

ON the creation of a *freehold* remainder, at one and the fame time with a particular eftate for years, we have before feen that at the common law livery muft be made to the particular tenant [r]. But if fuch a remainder be created afterwards, expectant on a leafe for years now in being, the livery muft not be made to the leffee for years, for then it operates nothing; "*nam quod femel meum eft, amplius meum* "*effe non poteft* [s];" but it muft be made to the remainder-man himfelf, by confent of the leffee for years: for without his [315] confent no livery of the poffeffion can be given [t]; partly becaufe fuch forcible livery would be an ejectment of the tenant from his term, and partly for the reafons before given [u] for introducing the doctrine of attornments.

LIVERY of feifin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, leffor, or his attorney, together with the feoffee, leffee, or his attorney, (for this may as effectually be done, by deputy or attorney, as by the principals themfelves in perfon) come to the land, or to the

p Co. Litt. 46.
q See pag. 165.
r pag. 167.
s Co. Litt. 49.
t Co. Litt. 48.
u pag. 288.

houfe

house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect; "I deliver these to you in the "name of seisin of all the lands and tenements contained in "this deed." But if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others [w]. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all [x]; but if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, antiently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feodal law [y], *pares debent interesse investiturae feudi, et non alii*: for which this reason is expresly given; because
[316] the peers or vasals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though afterwards the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed, (like that of all other attestations [z]) was still reserved to the *pares* or jury of the county [a]. Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in

w Co. Litt. 48. West. Symb. 251.
x Litt. § 414.
y *Feud. l. 2. t. 58.*
z See pag. 307.
a Gilb. 10. 35.

this

this cafe, but by the confent of the particular tenant; and the confent of one will not bind the reft [b]. And in all thefe cafes it is prudent, and ufual, to endorfe the livery of feifin on the back of the deed, fpecifying the manner, place, and time of making it; together with the names of the witneffes [c]. And thus much for livery in deed.

LIVERY in *law* is where the fame is not made *on* the land, but *in fight of it* only; the feoffor faying to the feoffee, "I "give you yonder land, enter, and take poffeffion." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwife; unlefs he dares not enter, through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as poffible to the lands [d], will fuffice without an entry [e]. This livery in law cannot however be given or received by attorney, but only by the parties themfelves [f].

2. THE conveyance by *gift*, *donatio*, is properly applied to the creation of an eftate-tail, as feoffment is to that of an eftate in fee, and leafe to that of an eftate for life or years. It differs in nothing from a feoffment, but in the nature of the eftate paffing by it: for the operative words of conveyance in this cafe are *do* or *dedi* [g]; and gifts in tail are equally imperfect without livery of feifin, as feoffments in fee-fimple [h]. And this is the only diftinction that Littleton feems to take, [317] when he fays [i], "it is to be underftood that there is feoffor "and feoffee, donor and donee, leffor and leffee;" *viz.* feoffor is applied to a feoffment in fee-fimple, donor to a gift in tail, and leffor to a leafe for life, or for years, or at will. In common acceptation gifts are frequently confounded with the next fpecies of deeds: which are,

3. GRANTS, *conceffiones*; the regular method by the common law of transferring the property of *incorporeal* hereditaments,

b Dyer. 18.
c See Appendix. N°. I.
d Litt. § 421, *&c.*
e Co. Litt. 48.
f *Ibid.* 52.
g Weft. Symbol. 256.
h Litt. § 59.
i § 57.

ments, or ſuch things whereof no livery can be had[k]. For which reaſon all corporeal hereditaments, as lands and houſes, are ſaid to lie *in livery*; and the others, as advowſons, commons, rents, reverſions, *&c*, to lie *in grant*[l]. And the reaſon is given by Bracton[m]: "*traditio*, or livery, *nihil aliud* "*eſt quam rei corporalis de perſona in perſonam, de manu in ma-* "*num, tranſlatio aut in poſſeſſionem inductio; ſed res incor-* "*porales, quae ſunt ipſum jus rei vel corpori inhaerens, tradi-* "*tionem non patiuntur*." Theſe therefore paſs merely by the delivery of the deed. And in ſigniores, or reverſions of lands, ſuch grant, together with the attornment of the tenant (while attornments were requiſite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate poſſeſſion. It therefore differs but little from a feoffment, except in it's ſubject matter: for the operative words therein commonly uſed are *dedi et conceſſi*, "have given and granted."

4. A LEASE is properly a conveyance of any lands or tenements, (uſually in conſideration of rent or other annual recompenſe) made for life, for years, or at will, but always for a *leſs* time than the leſſor hath in the premiſes; for if it be for the *whole* intereſt, it is more properly an aſſignment than a leaſe. The uſual words of operation in it are, "de-
[318] "miſe, grant, and to farm let; *dimiſi, conceſſi, et ad firmam* "*tradidi*." *Farm*, or *feorme*, is an old Saxon word ſignifying proviſions[n]: and it came to be uſed inſtead of rent or render, becauſe antiently the greater part of rents were reſerved in proviſions; in corn, in poultry, and the like; till the uſe of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at preſent, by a gradual departure from the original ſenſe, the word *farm* is brought to ſignify the very eſtate or lands ſo held upon farm or rent. By this conveyance an eſtate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of

k Co. Litt. 9.

l *Ibid.* 172.

m *l.* 2. *c.* 18.

n Spelm. *Gl.* 229.

ſeiſin

ſeiſin is indeed incident and neceſſary to one ſpecies of leaſes, *viz.* leaſes for life of corporeal hereditaments; but to no other.

WHATEVER reſtriction, by the ſeverity of the feodal law, might in times of very high antiquity be obſerved with regard to leaſes; yet by the common law, as it has ſtood for many centuries, all perſons ſeiſed of any eſtate might let leaſes to endure ſo long as their own intereſt laſted, but no longer. Therefore tenant in fee-ſimple might let leaſes of any duration; for he hath the whole intereſt: but tenant in tail, or tenant for life, could make no leaſes which ſhould bind the iſſue in tail or reverſioner; nor could a huſband, ſeiſed *jure uxoris*, make a firm or valid leaſe for any longer term than the joint lives of himſelf and his wife, for then his intereſt expired. Yet ſome tenants for life, where the fee-ſimple was in abeyance, might (with the concurrence of ſuch as have the guardianſhip of the fee) make leaſes of equal duration with thoſe granted by tenants in fee-ſimple, ſuch as parſons and vicars with conſent of the patron and ordinary[o]. So alſo biſhops, and deans, and ſuch other ſole eccleſiaſtical corporations as are ſeiſed of the fee-ſimple of lands in their corporate right, might, with the concurrence and confirmation of ſuch perſons as the law requires, have made leaſes for years, or for life, eſtates in tail, or in fee, without any limitation or controul. And corporations aggregate might have made what eſtates they pleaſed, without the con- [319] firmation of any other perſon whatſoever. Whereas now, by ſeveral ſtatutes, this power where it was unreaſonable, and might be made an ill uſe of, is reſtrained; and, where in the other caſes the reſtraint by the common law ſeemed too hard, it is in ſome meaſure removed. The former ſtatutes are called the *reſtraining*, the latter the *enabling* ſtatute. We will take a view of them all, in order of time.

AND, firſt, the *enabling* ſtatute, 32 Hen. VIII. c. 28. empowers three manner of perſons to make leaſes, to endure for three lives or one and twenty years; which could not do

[o] Co. Litt. 44.

ſo

ſo before. As firſt, tenant in tail may by ſuch leaſes bind his iſſue in tail, but not thoſe in remainder or reverſion. Secondly, a huſband ſeiſed in right of his wife, in fee-ſimple or fee-tail, provided the wife joins in ſuch leaſe, may bind her and her heirs thereby. Laſtly, all perſons ſeiſed of an eſtate of fee-ſimple in right of their churches, which extends not to parſons and vicars, may (without the concurrence of any other perſon) bind their ſucceſſors. But then there muſt many requiſites be obſerved, which the ſtatute ſpecifies, otherwiſe ſuch leaſes are not binding [p]. 1. The leaſe muſt be by indenture; and not by deed poll, or by parol. 2. It muſt begin from the making, or day of the making, and not at any greater diſtance of time (3). 3. If there be any old leaſe in being, it muſt be firſt abſolutely ſurrendered, or be within a year of expiring. 4. It muſt be *either* for twenty-one years, *or* three lives; and not for both. 5. It muſt not exceed the term of three lives, or twenty-one years, but may be for a ſhorter term. 6. It muſt be of corporeal hereditaments, and not of ſuch things as lie merely in grant; for no rent can be reſerved thereout by the common law, as the leſſor cannot reſort to them to diſtrein [q]. 7. It muſt be of

[p] Co. Litt. 44.

[q] But now by the ſtatute 5 Geo. III. c. 17. a leaſe of tithes or other incorporeal hereditaments, alone, may be granted by any biſhop or any ſuch eccleſiaſtical or eleemoſynary corporation, and the ſucceſſor

(3) By various acts of parliament, and alſo frequently by private ſettlements, a power is granted of making leaſes in poſſeſſion, but not in reverſion, for a certain term; the object being that the eſtate may not be incumbered by the act of the party beyond a ſpecific time. Yet perſons, who had this limited power of making leaſes in poſſeſſion only, had frequently demiſed the premiſes to hold *from the day of the date*; and the courts in ſeveral inſtances had determined that the words *from the day of the date* excluded the day of making the deed; and that of conſequence theſe were leaſes in reverſion, and void. But this queſtion having been brought again before lord Mansfield and the court of king's bench, that learned lord proved, with his uſual ability, that *from the day* might either be incluſive or excluſive of the day; and therefore that it ought to be conſtrued ſo as to effectuate theſe important deeds, and not to deſtroy them. Pugh *v.* Duke of Leeds, *Cowp.* 714.

lands and tenements moſt commonly letten for twenty years paſt; ſo that if they had been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is ſufficient. 8. The moſt uſual and cuſtomary feorm or rent, for twenty years paſt, muſt be reſerved yearly on ſuch leaſe. 9. Such leaſes muſt not be made without impeachment of waſte. Theſe are the guards, impoſed by the ſtatute (which was avowedly made for the ſecurity of farmers and the conſequent improvement of tillage) to prevent unreaſonable abuſes, in prejudice of the iſſue, the wife, or the ſucceſſor, of the reaſonable indulgence here given.

NEXT follows, in order of time, the *diſabling* or *reſtraining* ſtatute, 1 Eliz. c. 19. (made entirely for the benefit of the ſucceſſor) which enacts, that all grants by archbiſhops and biſhops (which include even thoſe confirmed by the dean and chapter; the which, however long or unreaſonable, were good at common law) other than for the term of one and twenty years or three lives from the making, or without reſerving the uſual rent, ſhall be void. Concurrent leaſes, if confirmed by the dean and chapter, are held to be within the exception of this ſtatute, and therefore valid; provided they do not exceed (together with the leaſe in being) the term permitted by the act [r]. But, by a ſaving expreſsly made, this ſtatute of 1 Eliz. did not extend to grants made by any biſhop to the crown; by which means queen Elizabeth procured many fair poſſeſſions to be made over to her by the prelates, either for her own uſe, or with intent to be granted out again to her favourites, whom ſhe thus gratified without any expenſe to herſelf. To prevent which [s] for the future, the ſtatute 1 Jac. I. c. 3. extends the prohibition to grants and leaſes made to the king, as well as to any of his ſubjects.

ſucceſſor ſhall be entitled to recover the rent by an action of debt, which (in caſe of a freehold leaſe) he could not have brought at the common law.

r Co. Litt. 45.

s 11 Rep. 71.

NEXT comes the ſtatute 13 Eliz. c. 10. explained and enforced by the ſtatutes 14 Eliz. c. 11 & 14. 18 Eliz. c. 11. and 43 Eliz. c. 29. which extends the reſtrictions, laid by
[321] the laſt mentioned ſtatute on biſhops, to certain other inferior corporations, both ſole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other eccleſiaſtical, or eleemoſynary corporations, and all parſons and vicars, are reſtrained from making any leaſes of their lands, unleſs under the following regulations: 1. They muſt not exceed twenty-one years, or three lives, from the making. 2. The accuſtomed rent, or more, muſt be yearly reſerved thereon. 3. Houſes in corporations, or market towns, may be let for forty years; provided they be not the manſion-houſes of the leſſors, nor have above ten acres of ground belonging to them; and provided the leſſee be bound to keep them in repair: and they may alſo be aliened in fee-ſimple for lands of equal value in recompenſe. 4. Where there is an old leaſe in being, no concurrent leaſe ſhall be made, unleſs where the old one will expire within three years. 5. No leaſe (by the equity of the ſtatute) ſhall be made without impeachment of waſte [t]. 6. All bonds and covenants tending to fruſtrate the proviſions of the ſtatutes of 13 & 18 Eliz. ſhall be void.

CONCERNING theſe reſtrictive ſtatutes there are two obſervations to be made. Firſt, that they do not by any conſtruction, enable any perſons to make ſuch leaſes as they were by common law diſabled to make. Therefore a parſon, or vicar, though he is reſtrained from making longer leaſes than for twenty-one years or three lives, even *with* the conſent of patron and ordinary, yet is not enabled to make any leaſe at all, ſo as to bind his ſucceſſor, *without* obtaining ſuch conſent [u]. Secondly, that though leaſes contrary to theſe acts are declared void, yet they are good againſt the *leſſor* during his life, if he be a ſole corporation; and are alſo good againſt an aggregate corporation ſo long as the head of it lives, who

[t] Co. Litt. 45. [u] *Ibid.* 44.

is preſumed to be the moſt concerned in intereſt. For the act was intended for the benefit of the ſucceſſor only; and no man ſhall make an advantage of his own wrong [w].

THERE is yet another reſtriction with regard to college leaſes, by ſtatute 18 Eliz. c. 6. which directs, that one third of the old rent, then paid, ſhould for the future be reſerved in wheat or malt, reſerving a quarter of wheat for each 6*s*. 8*d*. or a quarter of malt for every 5*s*; or that the leſſees ſhould pay for the ſame according to the price that wheat and malt ſhould be ſold for, in the market next adjoining to the reſpective colleges, on the market-day before the rent becomes due. This is ſaid [x] to have been an invention of lord treaſurer Burleigh, and ſir Thomas Smith, then principal ſecretary of ſtate; who, obſerving how greatly the value of money had ſunk, and the price of all proviſions riſen, by the quantity of bullion imported from the new-found Indies, (which effects were likely to increaſe to a greater degree) deviſed this method for upholding the revenues of colleges. Their foreſight and penetration has in this reſpect been very apparent: for, though the rent ſo reſerved in corn was at firſt but one third of the old rent, or half of what was ſtill reſerved in money, yet now the proportion is nearly inverted; and the money ariſing from corn rents is, *communibus annis*, almoſt double to the rents reſerved in money (4). [322]

w Co. Litt. 45.

x Strype's annals of Eliz.

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(4) The price of a quarter of wheat being at preſent near 50*s*. and the colleges receiving a quarter of wheat, or it's value, for every 13*s*. 4*d*. which they are paid in money, it follows that the corn rent will be in proportion to the money rent nearly as four to one.

But both theſe rents united are very far from the preſent value. Colleges therefore, in order to obtain the difference, generally take a fine upon the renewal of their leaſes. It was a great object to colleges to reſtrain thoſe in poſſeſſion from making long leaſes, and

THE leaſes of beneficed clergymen are farther reſtrained, in caſe of their non-reſidence, by ſtatutes 13 Eliz. c. 20. 14 Eliz. c. 11. 18 Eliz. c. 11. and 43 Eliz. c. 9. which direct, that if any beneficed clergyman be abſent from his cure above fourſcore days in any one year, he ſhall not only forfeit one year's profit of his benefice, to be diſtributed among the poor of the pariſh; but that all leaſes made by him, of the profits of ſuch benefice, and all covenants and agreements of like nature, ſhall ceaſe and be void (5): except in the caſe of licenſed pluraliſts, who are allowed to demiſe the living, on which they are non-reſident, to their curates only; provided ſuch curates do not abſent themſelves above
[323] forty days in any one year (6). And thus much for leaſes, with their ſeveral enlargements and reſtrictions [y].

5. AN *exchange* is a mutual grant of equal intereſts, the one in conſideration of the other. The word "exchange" is ſo individually requiſite and appropriated by law to this caſe, that it cannot be ſupplied by any other word or ex-

y For the other learning relating to leaſes, which is very curious and diffuſive, I muſt refer the ſtudent to 3 Bac. abridg. 295. (title, *leaſes and terms for years*) where the ſubject is treated in a perſpicuous and maſterly manner; being ſuppoſed to be extracted from a manuſcript of ſir Geoffrey Gilbert.

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impoveriſhing their ſucceſſors by receiving the whole value of the leaſe by a fine at the commencement of the term.

The corn rent has made the old rent approach in ſome degree nearer to it's preſent value; otherwiſe it ſhould ſeem the principal advantage of a corn rent is to ſecure the leſſor from the effect of a ſudden ſcarcity of corn.

(5) In a late caſe it was determined, where an incumbent had leaſed his rectory, and had been afterwards abſent for more than eighty days in a year, that his tenant could not maintain an ejectment againſt a ſtranger who had got into poſſeſſion without any right or title whatever. 2 *T. R.* 749.

(6) If the curate leaſes over, the leaſe will become void by his abſence; but not by the abſence of the incumbent. *Gibſ.* 740.

preſſed by any circumlocution [z]. The eſtates exchanged muſt be equal in quantity [a]; not of *value*, for that is immaterial, but of *intereſt*; as fee-ſimple for fee-ſimple, a leaſe for twenty years for a leaſe for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery [b]. But no livery of ſeiſin, even in exchanges of freehold, is neceſſary to perfect the conveyance [c]: for each party ſtands in the place of the other and occupies his right, and each of them hath already had corporal poſſeſſion of his own land. But entry muſt be made on both ſides; for, if either party die before entry, the exchange is void, for want of ſufficient notoriety [d]. And ſo alſo, if two parſons, by conſent of patron and ordinary, exchange their preferments; and the one is preſented, inſtituted, and inducted, and the other is preſented, and inſtituted, but dies before induction; the former ſhall not keep his new benefice, becauſe the exchange was not completed, and therefore he ſhall return back to his own [e]. For if, after an exchange of lands or other hereditaments, either party be evicted of thoſe which were taken by him in exchange, through defect of the other's title; he ſhall return back to the poſſeſſion of his own, by virtue of the implied warranty contained in all exchanges [f].

6. A PARTITION, is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands ſo held among them in ſeveralty, each taking a diſtinct [324] part. Here, as in ſome inſtances, there is a unity of intereſt, and in all a unity of poſſeſſion, it is neceſſary that they all mutually convey and aſſure to each other the ſeveral eſtates, which they are to take and enjoy ſeparately. By the common law coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common muſt have done it by deed: and in both caſes the conveyance muſt have been perfected by livery of ſeiſin [g]. And the ſtatutes of 31 Hen. VIII. c. 1. and

[z] Co. Litt. 50, 51.
[a] Litt. § 64, 65.
[b] Co. Litt. 51.
[c] Litt. § 62.
[d] Co. Litt. 50.
[e] Perk. § 288.
[f] pag. 300.
[g] Litt. § 250. Co. Litt. 169.

32 Hen. VIII. c. 32. made no alteration in this point. But the ſtatute of frauds 29 Car. II. c. 3. hath now aboliſhed this diſtinction, and made a deed in all caſes neceſſary.

THESE are the ſeveral ſpecies of *primary*, or *original* conveyances. Thoſe which remain are of the *ſecondary*, or *derivative* ſort; which preſuppoſe ſome other conveyance precedent, and only ſerve to enlarge, confirm, alter, reſtrain, reſtore, or transfer the intereſt granted by ſuch original conveyance. As,

7. RELEASES; which are a diſcharge or conveyance of a man's right in lands or tenements, to another that hath ſome former eſtate in poſſeſſion. The words generally uſed therein are "remiſed, releaſed, and for ever quit-claimed [h]." And theſe releaſes may enure either, 1. By way of *enlarging an eſtate*, or *enlarger l'eſtate:* as, if there be tenant for life or years, remainder to another in fee, and he in remainder releaſes all his right to the particular tenant and his heirs, this gives him the eſtate in fee [i]. But in this caſe the releſſee muſt be in *poſſeſſion* of ſome eſtate, for the releaſe to work upon; for if there be leſſee for years, and before he enters and is in poſſeſſion, the leſſor releaſes to him all his right in the reverſion, ſuch releaſe is void for want of poſſeſſion in the releſſee [k]. 2. By way of *paſſing an eſtate*, or *mitter l'eſtate:* as when one of two coparceners releaſeth all her
[325] right to the other, this paſſeth the fee-ſimple of the whole [l]. And in both theſe caſes there muſt be a privity of eſtate between the releſſor and releſſee [m]; that is, one of their eſtates muſt be ſo related to the other, as to make but one and the ſame eſtate in law. 3. By way of *paſſing a right*, or *mitter le droit:* as if a man be diſſeiſed, and releaſeth to his diſſeiſor all his right; hereby the diſſeiſor acquires a new right, which changes the quality of his eſtate, and renders that lawful which before was tortious or wrongful [n]. 4. By way of *extinguiſhment:* as if my tenant for life makes a leaſe to A for life, re-

[h] Litt. § 445.
[i] *Ibid.* § 465.
[k] *Ibid.* § 459.
[l] Co. Litt. 273.
[m] *Ibid.* 272, 273.
[n] Litt. § 466.

mainder to B and his heirs, and I releaſe to A; this extinguiſhes my right to the reverſion, and ſhall enure to the advantage of B's remainder as well as of A's particular eſtate [o]. 5. By way of *entry and feoffment*: as if there be two joint diſſeiſors, and the diſſeiſee releaſes to one of them, he ſhall be ſole ſeiſed, and ſhall keep out his former companion; which is the ſame in effect as if the diſſeiſee had entered, and thereby put an end to the diſſeiſin, and afterwards had enfeoffed one of the diſſeiſors in fee [p]. And hereupon we may obſerve, that when a man has in himſelf the poſſeſſion of lands, he muſt at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future intereſt, he may convey that right or intereſt by a mere releaſe to him that is in poſſeſſion of the land: for the occupancy of the releſſee is a matter of ſufficient notoriety already.

8. A CONFIRMATION is of a nature nearly allied to a releaſe. Sir Edward Coke defines it [q] to be a conveyance of an eſtate or right *in eſſe*, whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular eſtate is increaſed: and the words of making it are theſe, "have given, "granted, ratified, approved, and confirmed [r]." An inſtance of the firſt branch of the definition is, if tenant for life leaſeth for forty years, and dieth during that term; here the leaſe for years is voidable by him in reverſion: yet, if he hath confirmed the eſtate of the leſſee for years, before the death of tenant for life, it is no longer voidable but ſure [s]. [326]
The latter branch, or that which tends to the increaſe of a particular eſtate, is the ſame in all reſpects with that ſpecies of releaſe, which operates by way of enlargement.

9. A SURRENDER, *ſurſumredditio*, or rendering up, is of a nature directly oppoſite to a releaſe; for, as that operates by the greater eſtate's deſcending upon the leſs, a ſurrender is the falling of a leſs eſtate into a greater. It is defined [t], a yielding up of an eſtate for life or years to him that hath the im-

o *Ibid.* § 470.
p Co. Litt. 278.
q 1 Inſt. 295.
r Litt. § 515. 531.
s Litt. § 516.
t Co. Litt. 337.

 mediate

mediate reverſion or remainder, wherein the particular eſtate may merge or drown, by mutual agreement between them. It is done by theſe words, "hath ſurrendered, granted, and "yielded up." The ſurrenderor muſt be in poſſeſſion [u]; and the ſurrenderee muſt have a higher eſtate, in which the eſtate ſurrendered may merge: therefore tenant for life cannot ſurrender to him in remainder for years [w]. In a ſurrender there is no occaſion for livery of ſeiſin [x]; for there is a privity of eſtate between the ſurrenderor, and the ſurrenderee; the one's particular eſtate, and the other's remainder are one and the ſame eſtate; and livery having been once made at the creation of it, there is no neceſſity for having it afterwards. And, for the ſame reaſon, no livery is required on a releaſe or confirmation in fee to tenant for years or at will, though a freehold thereby paſſes: ſince the reverſion of the releſſor, or confirmor, and the particular eſtate of the releſſee, or confirmee, are one and the ſame eſtate; and where there is already a poſſeſſion, derived from ſuch a privity of eſtate, any farther delivery of poſſeſſion would be vain and nugatory [y].

10. AN *aſſignment* is properly a transfer, or making over to another, of the right one has in *any* eſtate; but it is uſually applied to an eſtate for life or years. And it differs from a leaſe only in this: that by a leaſe one grants an intereſt leſs
[327] than his own, reſerving to himſelf a reverſion; in aſſignments he parts with the whole property, and the aſſignee ſtands to all intents and purpoſes in the place of the aſſignor (7).

u Co. Litt. 338.
w Perk. § 589.
x Co Litt. 50.
y Litt. § 460.

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(7) This is far from being univerſally true; for there are a great variety of diſtinctions when the aſſignee is bound by the covenants of the aſſignor, and when he is not. The general rule is, that he is bound by all covenants, which run with the land; but not by collateral covenants, which do not run with the land. As if a leſſee covenants for himſelf, executors, and adminiſtrators, concerning a thing not in exiſtence, as to build a wall upon the premiſes, the

11. A DEFEAZANCE is a collateral deed, made at the ſame time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the eſtate then created may be *defeated*[z] or totally undone. And in this manner mortgages were in former times uſually made; the mortgagor enfeoffing the mortgagee, and he at the ſame time executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the ſame time with the original feoffment, was conſidered as part of it by the ancient law[a]; and, therefore only, indulged: no ſubſequent ſecret revocation of a ſolemn conveyance, executed by livery of ſeiſin, being allowed in thoſe days of ſimplicity and truth; though, when uſes were afterwards introduced, a revocation of ſuch uſes was permitted by the courts of equity. But things that were merely executory, or to be completed by matter ſubſequent, (as rents, of which no ſeiſin could be had till the time of payment; and ſo alſo annuities, conditions, warranties, and the like) were always liable to be recalled by defeazances made ſubſequent to the time of their creation[b].

II. THERE yet remain to be ſpoken of ſome few conveyances, which have their force and operation by virtue of the *ſtatute of uſes.*

USES and *truſts* are in their original of a nature very ſimilar, or rather exactly the ſame: anſwering more to the *fidei-*

[z] From the French verb *defaire, infectum reddere.*

[a] Co. Litt. 236.

[b] *Ibid.* 237.

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the aſſignee will not be bound; but in that caſe, the aſſignee will be bound, if the leſſee has covenanted for himſelf and aſſigns. The aſſignee in no caſe is bound by the covenant of the leſſee, to build a houſe for the leſſor any where off the premiſes, or to pay money to a ſtranger. Spencer's caſe, 5 *Co.* 16. The aſſignee is not bound by a covenant broken before aſſignment. 3 *Burr.* 1271. See *Com. Dig. Covenant.* But if an underleaſe is made even for a day leſs than the whole term, the underleſſee is not liable for rent or covenants to the original leſſee, like an aſſignee of the whole term. *Doug.* 174.

commiſſum

commissum than the *usus-fructus* of the civil law; which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance [c]. But the *fidei-commissum*, which usually was created by will, was
[328] the disposal of an inheritance to one, in confidence that he should convey it or dispose of the profits at the will of another. And it was the business of a particular magistrate, the *praetor fidei commissarius*, instituted by Augustus, to enforce the observance of this confidence [d]. So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice: which occasioned that known division of rights by the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary course of law; *jus fiduciarium*, a right in trust, for which there was a remedy in conscience; and *jus precarium*, a right in courtesy, for which the remedy was only by intreaty or request [e]. In our law, a use might be ranked under the rights of the second kind; being a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestuy que use*, or him to whose use it was granted, and suffer him to take the profits [f]. As, if a feoffment was made to A and his heirs, to the use of (or in trust for) B and his heirs; here at the common law A the *terre-tenant* had the legal property and possession of the land, but B the *cestuy que use* was in conscience and equity to have the profits and disposal of it.

THIS notion was transplanted into England from the civil law, about the close of the reign of Edward III [g], by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to *the use of* the religious houses [h]: which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction, which Augustus had vested in

c *Ff.* 7. 1. 1.
d *Inst.* 2. *tit.* 23.
e *Ff.* 43. 26. 1. Bacon on uses. 8°. 306.
f Plowd. 352.
g Stat. 50 Edw. III. c. 6. 1 Rich. II. c. 9. 1 Rep. 139.
h See pag. 271.

his

his *praetor*, of compelling the execution of such trusts in the court of chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet if a testator had enfeoffed another to his own use, and so was possessed of the use only, such use was devisable by will. But [329]
we have seen[i] how this evasion was crushed in it's infancy, by statute 15 Ric. II. c. 5. with respect to religious houses.

YET, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes: particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long wars in France and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal: through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore about the reign of Edward IV, (before whose time, lord Bacon remarks[k], there are not six cases to be found relating to the doctrine of uses) the courts of equity began to reduce them to something of a regular system.

ORIGINALLY it was held that the chancery could give no relief, but against the very person himself intrusted for *cestuy que use*, and not against his heir or alienee. This was altered in the reign of Henry VI, with respect to the heir[l]; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use[m].

[i] page 272.
[k] on uses. 313.
[l] Keilw. 42. Yearbook. 22 Edw. IV. 6.
[m] Keilw. 46. Bacon of uses. 312.

But

But a purchaſor for a valuable conſideration, without notice, might hold the land diſcharged of any truſt or confidence. And alſo it was held, that neither the king or queen, on account of their dignity royal [n], nor any corporation aggre-
[330] gate, on account of it's limited capacity [o], could be ſeiſed to any uſe but their own; that is, they might hold the lands, but were not compellable to execute the truſt. And, if the feoffee to uſes died without heir, or committed a forfeiture or married, neither the lord who entered for his eſcheat or forfeiture, nor the huſband who retained the poſſeſſion as tenant by the curteſy, nor the wife to whom dower was aſſigned, were liable to perform the uſe [p]; becauſe they were not parties to the truſt, but came in by act of law; though doubtleſs their title in reaſon was no better than that of the heir.

ON the other hand the uſe itſelf, or intereſt of *ceſtuy que uſe*, was learnedly refined upon with many elaborate diſtinctions. And, 1. It was held that nothing could be granted to a uſe, whereof the uſe is inſeparable from the poſſeſſion; as annuities, ways, commons, and authorities, *quae ipſo uſu conſumuntur* [q]: or whereof the ſeiſin could not be inſtantly given [r]. 2. A uſe could not be raiſed without a ſufficient conſideration. For where a man makes a feoffment to another without any conſideration, equity preſumes that he meant it to the uſe of himſelf [s]: unleſs he expreſsly declares it to be to the uſe of another, and then nothing ſhall be preſumed contrary to his own expreſſions [t]. But, if either a good or a valuable conſideration appears, equity will immediately raiſe a uſe correſpondent to ſuch conſideration [u]. 3. Uſes were deſcendible according to the rules of the common law, in the caſe of inheritances in poſſeſſion [w]; for in this and many other reſpects *aequitas ſequitur legem*, and can-

n Bro. *Abr. tit. Feoffm. al uſes.* 31. Bacon of uſes. 346, 347.

o Bro. *Abr. tit. Feoffm. al uſes.* 40. Bacon. 347.

p 1 Rep. 122.

q 1 Jon. 127.

r Cro. Eliz. 401.

s See page 296.

t 1 And. 37.

u Moor. 684.

w 2 Roll. Abr. 780.

not

not eſtabliſh a different rule of property from that which the law has eſtabliſhed. 4. Uſes might be aſſigned by ſecret deeds between the parties [x], or be deviſed by laſt will and teſtament [y]: for, as the legal eſtate in the ſoil was not tranſferred by theſe tranſactions, no livery of ſeiſin was neceſſary; [331] and, as the intention of the parties was the leading principle in this ſpecies of property, any inſtrument declaring that intention was allowed to be binding in equity. But *ceſtuy que uſe* could not at common law aliene the legal intereſt of the lands, without the concurrence of his feoffee [z]; to whom he was accounted by law to be only tenant at ſufferance [a]. 5. Uſes were not liable to any of the feodal burthens; and particularly did not eſcheat for felony or other defect of blood; for eſcheats, *&c.* are the conſequence of *tenure*, and uſes are held of nobody: but the land itſelf was liable to eſcheat, whenever the blood of the feoffee to uſes was extinguiſhed by crime or by defect; and the lord (as was before obſerved) might hold it diſcharged of the uſe [b]. 6. No wife could be endowed, or huſband have his curteſy, of a uſe [c]: for no truſt was declared for their benefit, at the original grant of the eſtate. And therefore it became cuſtomary, when moſt eſtates were put in uſe, to ſettle before marriage ſome joint eſtate to the uſe of the huſband and wife for their lives; which was the original of modern jointures [d]. 7. A uſe could not be extended by writ of *elegit*, or other legal proceſs, for the debts of *ceſtuy que uſe* [e]. For, being merely a creature of equity, the common law, which looked no farther than to the perſon actually ſeiſed of the land, could award no proceſs againſt it.

IT is impracticable, upon our preſent plan, to purſue the doctrine of uſes through all the refinements and niceties, which the ingenuity of the times (abounding in ſubtile diſquiſitions) deduced from this child of the imagination; when once a departure was permitted from the plain ſimple rules of

[x] Bacon of uſes, 312.
[y] *Ibid.* 308.
[z] Stat. 1 Ric. III. c. 1.
[a] Bro. *Abr. ibid.* 23.
[b] Jenk. 190.
[c] 4 Rep. 1. 2 And. 75.
[d] See pag. 137.
[e] Bro. *Abr. tit. executions.* 90.

property

property eſtabliſhed by the ancient law. Theſe principal out-
lines will be fully ſufficient to ſhew the ground of lord Bacon's
complaint [f], that this courſe of proceeding "was turned to
"deceive many of their juſt and reaſonable rights. A man,
"that had cauſe to ſue for land, knew not againſt whom to
[332] "bring his action, or who was the owner of it. The wife was
"defrauded of her thirds; the huſband of his curteſy; the lord
"of his wardſhip, relief, heriot, and eſcheat; the creditor
"of his extent for debt; and the poor tenant of his leaſe."
To remedy theſe inconveniencies abundance of ſtatutes were provided, which made the lands liable to be extended by the creditors of *ceſtuy que uſe* [g], allowed actions for the freehold to be brought againſt him, if in the actual pernancy or enjoyment of the profits [h]; made him liable to actions of waſte [i]; eſtabliſhed his conveyances and leaſes made without the concurrence of his feoffees [k]; and gave the lord the wardſhip of his heir, with certain other feodal perquiſites [l].

THESE proviſions all tended to conſider *ceſtuy que uſe* as the real owner of the eſtate; and at length that idea was carried into full effect by the ſtatute 27 Hen. VIII. c. 10. which is uſually called the *ſtatute of uſes*, or, in conveyances and pleadings, the ſtatute *for transferring uſes into poſſeſſion*. The hint ſeems to have been derived from what was done at the acceſſion of king Richard III; who having, when duke of Glouceſter, been frequently made a feoffee to uſes, would upon the aſſumption of the crown (as the law was then underſtood) have been entitled to hold the lands diſcharged of the uſe. But, to obviate ſo notorious an injuſtice, an act of parliament was immediately paſſed [m], which ordained, that, where he had been ſo enfeoffed jointly with other perſons, the land ſhould veſt in the other feoffees, as if he had never been named; and that, where he ſtood ſolely enfeoffed, the eſtate

[f] Uſe of the law. 153.

[g] Stat. 50 Edw. III. c. 6. 2 Ric. II. ſeſſ. 2. c. 3. 19 Hen. VII. c. 15.

[h] Stat. 1 Ric. II. c. 9. 4 Hen. IV. c. 7. c. 15. 11 Hen. VI. c. 3. 1 Hen. VII. c. 1.

[i] Stat. 11 Hen. VI. c. 5.

[k] Stat. 1 Ric. III. c. 1.

[l] Stat. 4 Hen. VII. c. 17. 19 Hen. VII. c. 15.

[m] 1 Ric. III. c. 5.

itſelf

itſelf ſhould veſt in *ceſtuy que uſe* in like manner as he had the uſe. And ſo the ſtatute of Henry VIII. after reciting the various inconveniences before-mentioned, and many others, enacts, that "when any perſon ſhall be *ſeiſed* of lands, &c. "to the uſe, confidence, or truſt, of any other perſon or body "politic, the perſon or corporation entitled to the uſe in fee- [333]
"ſimple, fee-tail, for life, or years, or otherwiſe, ſhall from "thenceforth ſtand and be ſeiſed or poſſeſſed of the land, &c. "of and in the like eſtates as they have in the uſe, truſt, or "confidence; and that the eſtate of the perſon ſo ſeiſed to "uſes ſhall be deemed to be in him or them that have the "uſe, in ſuch quality, manner, form, and condition, as they "had before in the uſe." The ſtatute thus *executes* the uſe, as our lawyers term it; that is, it conveys the poſſeſſion to the uſe, and transfers the uſe into poſſeſſion: thereby making *ceſtuy que uſe* complete owner of the lands and tenements, as well at law as in equity.

The ſtatute having thus, not aboliſhed the conveyance to uſes, but only annihilated the intervening eſtate of the feoffee, and turned the intereſt of *ceſtuy que uſe* into a legal inſtead of an equitable ownerſhip; the courts of common law began to take cognizance of uſes, inſtead of ſending the party to ſeek his relief in chancery. And, conſidering them now as merely a mode of conveyance, very many of the rules before eſtabliſhed in equity were adopted with improvements by the judges of the common law. The ſame perſons only were held capable of being ſeiſed to a uſe, the ſame conſiderations were neceſſary for raiſing it, and it could only be raiſed of the ſame hereditaments, as formerly. But as the ſtatute, the inſtant it was raiſed, converted it into an actual poſſeſſion of the land, a great number of the incidents, that formerly attended it in it's fiduciary ſtate, were now at an end. The land could not eſcheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaſor diſcharged of the uſe, nor be liable to dower or curteſy on account of the ſeiſin of ſuch feoffee; becauſe the legal eſtate never reſts in him for a moment, but is inſtantaneouſly transferred to *ceſtuy que uſe*,

as

as ſoon as the uſe is declared. And, as the uſe and the land were now convertible terms, they became liable to dower, curteſy, and eſcheat, in conſequence of the ſeiſin of *ceſtuy que uſe*, who was now become the *terre-tenant* alſo; and they likewiſe were no longer deviſable by will.

[334] THE various neceſſities of mankind induced alſo the judges very ſoon to depart from the rigour and ſimplicity of the rules of the common law, and to allow a more minute and complex conſtruction upon conveyances to uſes than upon others Hence it was adjudged, that the uſe need not always be executed the inſtant the conveyance is made: but, if it cannot take effect at that time, the operation of the ſtatute may wait till the uſe ſhall ariſe upon ſome future contingency, to happen within a reaſonable period of time; and in the mean while the antient uſe ſhall remain in the original grantor: as, when lands are conveyed to the uſe of A and B, after a marriage ſhall be had between them [n], or to the uſe of A and his heirs till B ſhall pay him a ſum of money, and then to the uſe of B and his heirs [o]. Which doctrine, when deviſes by will were again introduced, and conſidered as equivalent in point of conſtruction to declarations of uſes, was alſo adopted in favour of *executory deviſes* [p]. But herein theſe, which are called *contingent* or *ſpringing* uſes, differ from an executory deviſe; in that there muſt be a perſon ſeiſed to ſuch uſes at the time when the contingency happens, elſe they can never be executed by the ſtatute; and therefore if the eſtate of the feoffee to ſuch uſe be deſtroyed by alienation or otherwiſe, before the contingency ariſes, the uſe is deſtroyed for ever [q]: whereas by an executory deviſe the freehold itſelf is transferred to the future deviſee. And, in both theſe caſes, a fee may be limited to take effect after a fee [r]; becauſe, though that was forbidden by the common law in favour of the lord's eſcheat, yet when the legal eſtate was not extended beyond one fee-ſimple, ſuch ſubſequent uſes (after a

[n] 2 Roll. Abr. 791. Cro. Eliz 439.

[o] Bro *Abr. tit. Feoffm. al uſes* 30.

[p] See pag. 173.

[q] 1 Rep. 134. 138. Cro. Eliz. 439.

[r] Pollexf. 78. 10 Mod. 423.

uſe

ufe in fee) were before the ftatute permitted to be limited in equity; and then the ftatute executed the legal eftate in the fame manner as the ufe before fubfifted. It was alfo held, that a ufe, though executed, may change from one to another by circumftances *ex poft facto* [s]; as, if A makes a feoffment [335] to the ufe of his intended wife and her eldeft fon for their lives, upon the marriage the wife takes the whole ufe in feveralty; and, upon the birth of a fon, the ufe is executed jointly in them both [t]. This is fometimes called a *fecondary*, fometimes a *fhifting*, ufe. And, whenever the ufe limited by the deed expires, or cannot veft, it returns back to him who raifed it, after fuch expiration or during fuch impoffibility, and is ftiled a *refulting* ufe. As, if a man makes a feoffment to the ufe of his intended wife for life, with remainder to the ufe of her firft-born fon in tail; here, till he marries, the ufe refults back to himfelf; after marriage, it is executed in the wife for life; and, if fhe dies without iffue, the whole refults back to him in fee [u]. It was likewife held, that the ufes originally declared may be revoked at any future time, and new ufes be declared of the land, provided the grantor referved to himfelf fuch a power at the creation of the eftate; whereas the utmoft that the common law would allow, was a deed of defeazance coeval with the grant itfelf (and therefore efteemed a part of it) upon events fpecifically mentioned [w]. And, in cafe of fuch a revocation, the old ufes were held inftantly to ceafe, and the new ones to become executed in their ftead [x]. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who (as lord Bacon obferves [y]) have always affected to have the difpofition of their property revocable in their own time, and irrevocable ever afterwards.

By this equitable train of decifions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminifhed. But one or two technical

s Bro. *Abr. tit. Feoffm. al ufes.* 30.
t Bacon of ufes. 351.
u *Ibid.* 350. 1 Rep. 120.
w See pag. 327.
x Co. Litt. 237.
y on ufes. 316.

ſcruples, which the judges found it hard to get over, reſtored it with tenfold increaſe. They held, in the firſt place, that "no uſe could be limited on a uſe [z]," and that when a man bargains and ſells his land for money, which raiſes a uſe by implication to the bargainee, the limitation of a farther uſe to another perſon is repugnant, and therefore [336] void [a]. And therefore, on a feoffment to A and his heirs, to the uſe of B and his heirs, in truſt for C and his heirs, they held that the ſtatute executed only the firſt uſe, and that the ſecond was a mere nullity: not adverting, that the inſtant the firſt uſe was executed in B, he became ſeiſed to the uſe of C, which ſecond uſe the ſtatute might as well be permitted to execute as it did the firſt; and ſo the legal eſtate might be inſtantaneouſly tranſmitted down, through a hundred uſes upon uſes, till finally executed in the laſt *ceſtuy que uſe* (8). Again; as the ſtatute mentions only ſuch perſons as were *ſeiſed* to the uſe of others, this was held not to extend to terms of years, or other chattel intereſts, whereof the termor is not *ſeiſed*, but only *poſſeſſed* [b]; and therefore, if a term of one thouſand years be limited to A, to the uſe of (or in truſt for) B, the ſtatute does not execute this uſe, but leaves it as at common law [c]. And laſtly, (by more modern reſolutions) where lands are given to one and his heirs, in truſt to receive and pay over the profits to another, this uſe is not executed by the ſtatute; for the land muſt remain in the truſtee to enable him to perform the truſt [d] (9).

z Dyer. 155.
a 1 And. 37. 136.
b Bacon law of uſes. 335. Jenk. 244.
c Poph. 76. Dyer. 369.
d 1 Equ. Caſ. Ab. 383, 384.

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(8) It is the practice to introduce only the names of the truſtee and the *ceſtui que truſt*; the eſtate being conveyed to A and his heirs, to the uſe of A and his heirs, in truſt for B and his heirs; and thus this important ſtatute has been effectually repealed by the repetition of half a dozen words.

(9) I ſhould be inclined to think that the caſe as expreſſed by the learned Judge would be conſtrued an uſe executed by the ſtatute. In the authority referred to in *Eq. Ca. Abr.* 383, the truſtees were firſt

OF the two more antient diſtinctions the courts of equity quickly availed themſelves. In the firſt caſe it was evident, that B was never intended by the parties to have any beneficial intereſt; and, in the ſecond, the *ceſtuy que uſe* of the term was expreſsly driven into the court of chancery to ſeek his remedy: and therefore that court determined, that though theſe were not *uſes* which the ſtatute could execute, yet ſtill they were *truſts* in equity, which in conſcience ought to be performed [e]. To this the reaſon of mankind aſſented, and the doctrine of uſes was revived, under the denomination of *truſts*: and thus, by this ſtrict conſtruction of the courts of law, a ſtatute made upon great deliberation, and introduced in the moſt ſolemn manner, has had little other effect than to make a ſlight alteration in the formal words of a conveyance [f].

HOWEVER, the courts of equity, in the exerciſe of this new juriſdiction, have wiſely avoided in a great degree thoſe miſchiefs which made uſes intolerable. The ſtatute of frauds, 29 Car. II. c. 3. having required that every declaration, aſſignment, or grant of any truſt in lands or hereditaments, (except ſuch as ariſe from implication or conſtruction of law) ſhall be made in writing ſigned by the party, or by his written will; the courts now conſider a truſt-eſtate (either when expreſsly declared or reſulting by ſuch implication) as equivalent to the legal ownerſhip, governed by the ſame rules of property, and liable to every charge in equity, which the [337]

[e] 1 Hal. P.C. 248. [f] Vaugh. 50. Atk. 591.

firſt to pay legacies and annuities, and then to pay over the ſurplus to a married woman for her ſeparate uſe. To prevent a truſt from being executed by the ſtatute in caſes of this kind, it ſeems neceſſary that the truſtees ſhould have ſome control and diſcretion in the application of the profits of the eſtate, as to make repairs, or to provide for the maintenance of the *ceſtui que truſt*. 1 *Bro.* 75. 2 *T. R.* 444. Where there is no ſuch ſpecial circumſtance in the grant, it appears to be equivalent to a direction to the truſtees to permit the *ceſtui que truſt* to take the profits of the eſtate, which is fully eſtabliſhed to be an uſe executed. *Eq. Ca. Abr.* 383.

other is ſubject to in law: and, by a long ſeries of uniform determinations, for now near a century paſt, with ſome aſſiſtance from the legiſlature, they have raiſed a new ſyſtem of rational juriſprudence, by which truſts are made to anſwer in general all the beneficial ends of uſes, without their inconvenience or frauds. The truſtee is conſidered as merely the inſtrument of conveyance, and can in no ſhape affect the eſtate, unleſs by alienation for a valuable conſideration to a purchaſor without notice [g]; which, as *ceſtuy que uſe* is generally in poſſeſſion of the land, is a thing that can rarely happen. The truſt will deſcend, may be aliened, is liable to debts, to executions on judgments, ſtatutes, and recognizances, (by the expreſs proviſion of the ſtatute of frauds) to forfeiture, to leaſes and other incumbrances, nay even to the curteſy of the huſband, as if it was an eſtate at law. It has not yet indeed been ſubjected to dower, more from a cautious adherence to ſome haſty precedents [h], than from any well-grounded principle (10). It hath alſo been held not liable to eſcheat to the lord, in conſequence of attainder or want of heirs [i]: becauſe the truſt could never be intended for his benefit. But let us now return to the ſtatute of uſes.

[g] 2 Freem. 43.

[h] 1 Chanc. Rep. 254. 2 P. Wms. 640.

[i] Hard. 494. Burgeſs and Wheat. Hil. 32 Geo. II. in Canc.

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(10) It has been decided, that when the legal and equitable eſtates meet in the ſame perſon, the truſt or equitable eſtate is merged in the legal eſtate; as if a wife ſhould have the legal eſtate and the huſband the equitable; and if they have an only child, to whom theſe eſtates deſcend, and who dies inteſtate without iſſue, the two eſtates having united, the deſcent will follow the legal eſtate, and the eſtate will go to an heir on the part of the mother: and thus, which appears ſtrange, the beneficial intereſt will paſs out of one family into another, between whom there is no connexion by blood. *Doug.* 741.

Before the ſtatute of uſes there was neither dower nor tenancy by the curteſy of an uſe, p. 331. It is therefore an unaccountable inconſiſtency, that, ſince the ſtatute, the huſband ſhould have curteſy of a truſt eſtate, and that the wife ſhould out of a ſimilar eſtate be deprived of dower. See *ante*, p. 132. n. 11.

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THE only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only antient conveyance of corporeal freeholds: the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. But this now has given way to

12. A TWELFTH species of conveyance, called a *covenant to stand seised to uses*: by which a man, seised of lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land[k], without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage. [338]

13. A THIRTEENTH species of conveyance, introduced by this statute, is that of a *bargain and sale* of lands; which is a kind of a real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee; and becomes by such a bargain a trustee for, or seised to the use of, the bargainee; and then the statute of uses completes the purchase[l]; or, as it hath been well expressed[m], the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of parliament by statute 27 Hen. VIII. c. 16. that such bargains

k Bacon. Use of the law. 151.

l *Ibid.* 150.

m Cro. Jac. 696.

and ſales ſhould not enure to paſs a freehold, unleſs the ſame be made by indenture, and *enrolled* within ſix months in one of the courts of Weſtminſter-hall or with the *cuſtos rotulorum* of the county. Clandeſtine bargains and ſales of chattel intereſts, or leaſes for years, were thought not worth regarding, as ſuch intereſts were very precarious till about ſix years before [n]; which alſo occaſioned them to be overlooked in framing the ſtatute of uſes: and therefore ſuch bargains and ſales are not directed to be enrolled. But how impoſſible it is to
[339] foreſee, and provide againſt, *all* the conſequences of innovations! This omiſſion has given riſe to

14. A FOURTEENTH ſpecies of conveyance, *viz.* by *leaſe and releaſe;* firſt invented by ſerjeant Moore, ſoon after the ſtatute of uſes, and now the moſt common of any, and therefore not to be ſhaken; though very great lawyers (as, particularly, Mr. Noy, attorney-general to Charles I.) have formerly doubted it's validity [o]. It is thus contrived. A leaſe, or rather bargain and ſale, upon ſome pecuniary conſideration, for one year, is made by the tenant of the freehold to the leſſee or bargainee. Now this, without any enrollment, makes the bargainor ſtand ſeiſed to the uſe of the bargainee, and veſts in the bargainee the *uſe* of the term for a year; and then the ſtatute immediately annexes the *poſſeſſion.* He therefore being thus in poſſeſſion, is capable of receiving a releaſe of the freehold and reverſion; which, we have ſeen before [p], muſt be made to a tenant in poſſeſſion: and, accordingly, the next day, a releaſe is granted to him [q]. This is held to ſupply the place of livery of ſeiſin: and ſo a conveyance by leaſe and releaſe is ſaid to amount to a feoffment [r].

15. To theſe may be added deeds to *lead* or *declare the uſes* of other more direct conveyances, as feoffments, fines, and recoveries; of which we ſhall ſpeak in the next chapter: and,

16. DEEDS of *revocation of uſes;* hinted at in a former page [s], and founded in a previous power, reſerved at the raiſ-

n See pag. 142.
o 2 Mod. 252.
p pag. 324.
q See appendix. N°. II. § 1, 2.
r Co. Litt. 270. Cro. Jac. 604.
s pag. 335.

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ing of the uſes [t], to revoke ſuch as were then declared; and to appoint others in their ſtead, which is incident to the power of revocation [u]. And this may ſuffice for a ſpecimen of conveyances founded upon the ſtatute of uſes; and will finiſh our obſervations upon ſuch deeds as ſerve to *transfer* real property.

BEFORE we conclude, it will not be improper to ſubjoin [340] a few remarks upon ſuch deeds as are uſed not to *convey*, but to *charge* or incumber, lands, and to *diſcharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeazances* upon them both.

1. AN *obligation* or bond, is a deed [v] whereby the obligor obliges himſelf, his heirs, executors, and adminiſtrators, to pay a certain ſum of money to another at a day appointed. If this be all, the bond is called a ſingle one, *ſimplex obligatio*: but there is generally a condition added, that if the obligor does ſome particular act, the obligation ſhall be void, or elſe ſhall remain in full force: as, payment of rent; performance of covenants in a deed; or repayment of a principal ſum of money borrowed of the obligee, with intereſt, which principal ſum is uſually one half of the penal ſum ſpecified in the bond. In caſe this condition is not performed, the bond becomes forfeited, or abſolute at law, and charges the obligor while living; and after his death the obligation deſcends upon his heir, who (on defect of perſonal aſſets) is bound to diſcharge it, provided he has real aſſets by deſcent as a recompenſe. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands (11). How it affects

t See appendix. N°. II. pag. xi.

u Co. Litt. 237.

v See appendix. No. III. pag. xiii.

(11) If in a bond the obligor *binds himſelf*, without adding his *heirs, executors, and adminiſtrators*, the executors and adminiſtrators are bound but not the heir. *Shep. Touch.* 369. A bond does not ſeem properly to be called an incumbrance upon land; for it does not follow the land like a recognizance and a judgment; and even

 if

the perſonal property of the obligor, will be more properly conſidered hereafter.

IF the condition of a bond be impoſſible at the time of making it, or be to do a thing contrary to ſome rule of law that is merely poſitive, or be uncertain, or inſenſible, the condition alone is void, and the bond ſhall ſtand ſingle, and unconditional: for it is the folly of the obligor to enter into ſuch an obligation, from which he can never be releaſed. If it be to do a thing that is *malum in ſe*, the obligation itſelf is void: for the whole is an unlawful contract, and the obligee ſhall take no advantage from ſuch a tranſaction (12). And if the condition be poſſible at the time of making it, and after-
[341] wards becomes impoſſible by the act of God, the act of law, or the act of the obligee himſelf, there the penalty of the obligation is ſaved: for no prudence or foreſight of the obligor could guard againſt ſuch a contingency [w]. On the forfeiture

[w] Co. Litt. 206.

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if the heir at law alienes the land, the obligee in the bond, by which the heir is bound, can have his remedy only againſt the perſon of the heir to the amount of the value of the land; but he cannot follow it when it is in the poſſeſſion of a *bonâ fide* purchaſor. *Bull. N. P.* 175.

(12) And if the bond be ſimply conditioned for the payment of money, yet if it was in fact given upon a *turpis contractus*, a contract either illegal or immoral, it has been determined, that the turpitude of the tranſaction may be pleaded in bar to an action upon the bond in a court of law. 2 *Wilſ.* 347. But it is the common practice to apply to a court of equity for an injunction to ſuch actions. Where bonds have been given in conſideration of ſeduction and incontinence, a diſtinction has been made between bonds given for future cohabitation, which being for a clear immoral conſideration, are void (3 *Burr.* 1568.), and thoſe which are given as a compenſation (the *præmium pudoris*) for the injury done to a woman by her ſeducer, which, in general, are good. 2 *P. Wms.* 432. 2 *Wilſ.* 339. Yet in one caſe, where a young woman had been ſeduced by a married man, and had occaſioned a ſeparation between him and his wife, lord Hardwicke held that ſhe was too criminal to derive any benefit from ſuch a bond. 2 *Veſ.* 160. *Fonbl. Tr. of Eq.* 216.

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of a bond, or it's becoming ſingle, the whole penalty was formerly recoverable at law: but here the courts of equity interpoſed, and would not permit a man to take more than in conſcience he ought; *viz.* his principal, intereſt, and expenſes, in caſe the forfeiture accrued by non-payment of money borrowed; the damages ſuſtained, upon non-performance of covenants; and the like. And the like practice having gained ſome footing in the courts of law [x], the ſtatute 4 & 5 Ann. c. 16. at length enacted, in the ſame ſpirit of equity, that, in caſe of a bond, conditioned for the payment of money, the payment or tender of the principal ſum due, with intereſt and coſts, even though the bond be forfeited and a ſuit commenced thereon, ſhall be a full ſatisfaction and diſcharge.

2. A *recognizance* is an obligation of record, which a man enters into before ſome court of record or magiſtrate duly authorized [y], with condition to do ſome particular act; as to appear at the aſſiſes, to keep the peace, to pay a debt, or the like. It is in moſt reſpects like another bond: the difference being chiefly this: that the bond is the creation of a freſh debt or obligation *de novo*, the recognizance is an acknowlegement of a former debt upon record; the form whereof is, "that A. B. doth acknowlege to owe to our lord the king, to "the plaintiff, to C. D. or the like, the ſum of ten pounds," with condition to be void on performance of the thing ſtipulated: in which caſe the king, the plaintiff C. D. *&c.* is called the cognizee, "*is cui cognoſcitur*;" as he that enters into the recognizance is called the cognizor, "*is qui cognoſcit.*" This, being either certified to, or taken by the officer of ſome court, is witneſſed only by the record of that court, and not by the party's ſeal: ſo that it is not in ſtrict propriety a deed, though the effects of it are greater than a common obligation; being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrollment on record [z]. There are alſo other recognizances, of a private kind, *in nature of a ſtatute ſtaple*, by [342]

x 2 Keb. 553. 555. Salk. 596, 597. 6 Mod. 11. 60. 101.

y Bro. *Abr. tit. recognizance.* 24.

z Stat. 29 Car. II. c. 3. See pag. 161.

virtue

virtue of the ſtatute 23 Hen. VIII. c. 6. which have been already explained [a], and ſhewn to be a charge upon real property.

3. A DEFEAZANCE, on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the ſame manner as a defeazance of an eſtate before-mentioned. It differs only from the common condition of a bond, in that the one is always inſerted in the deed or bond itſelf, the other is made between the ſame parties by a ſeparate, and frequently a ſubſequent deed [b]. This, like the condition of a bond, when performed, diſcharges and diſincumbers the eſtate of the obligor.

THESE are the principal ſpecies of deeds or matter *in pais*, by which eſtates may be either conveyed, or at leaſt affected. Among which the conveyances to uſes are by much the moſt frequent of any; though in theſe there is certainly one palpable defect, the want of ſufficient notoriety: ſo that purchaſors or creditors cannot know with any abſolute certainty, what the eſtate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the antient feodal method of conveyance (by giving corporal ſeiſin of the lands) this notoriety was in ſome meaſure anſwered; but all the advantages reſulting from thence are now totally defeated by the introduction of death-bed deviſes and ſecret conveyances: and there has never been yet any ſufficient guard provided againſt fraudulent charges and incumbrances; ſince the diſuſe of the old Saxon cuſtom of tranſacting all conveyances at the county court, and entering a memorial of them in the chartulary or leger-book of ſome adjacent monaſtery [c]; and the failure of the general regiſter eſtabliſhed by king Richard the firſt, for the ſtarrs or mortgages made to
[343] Jews, in the *capitula de Judaeis*, of which Hoveden has preſerved a copy. How far the eſtabliſhment of a like general regiſter, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deſerves to be

a See pag. 160.

b Co. Litt. 237. 2 Sand. 47.

c Hickes *Differtat. epiſtolar.* 9.

well

well confidered. In Scotland every act and event, regarding the tranfmiffion of property, is regularly entered on record [d]. And fome of our own provincial divifions, particularly the extended county of York, and the populous county of Middlefex, have prevailed with the legiflature [e] to erect fuch regifters in their feveral diftricts. But, however plaufible thefe provifions may appear in theory, it hath been doubted by very competent judges, whether more difputes have not arifen in thofe counties by the inattention and omiffions of parties, than prevented by the ufe of regifters (13).

[d] Dalrymple on feodal property. 262. *&c.*

[e] Stat. 2 & 3 Ann. c. 4. 6 Ann. c. 35. 7 Ann. c. 20. 8 Geo. II. c. 6.

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(13) By the regifter acts, a regiftered deed fhall be preferred to a prior unregiftered deed ; yet it has been decreed by lord Hardwicke, if the fubfequent purchafer by the regiftered deed had previous notice of the unregiftered one, he fhall not avail himfelf of his deed, but the firft purchafer fhall be preferred. 1 *Vef.* 64.

CHAPTER THE TWENTY-FIRST.

OF ALIENATION BY MATTER OF RECORD.

ASSURANCES by *matter of record* are ſuch as do not entirely depend on the act or conſent of the parties themſelves: but the ſanction of a court of record is called in to ſubſtantiate, preſerve, and be a perpetual teſtimony of the transfer of property from one man to another; or of it's eſtabliſhment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. PRIVATE *acts of parliament* are, eſpecially of late years, become a very common mode of aſſurance. For it may ſometimes happen, that by the ingenuity of ſome, and the blunders of other practitioners, an eſtate is moſt grievouſly entangled by a multitude of contingent remainders, reſulting truſts, ſpringing uſes, executory deviſes, and the like artificial contrivances; (a confuſion unknown to the ſimple conveyances of the common law) ſo that it is out of the power of either the courts of law or equity to relieve the owner. Or, it may ſometimes happen, that by the ſtrictneſs or omiſſions of family ſettlements, the tenant of the eſtate is abridged of ſome reaſonable power, (as letting leaſes, making a jointure for a wife, or the like) which power cannot be given him by the ordinary judges either in common law or equity. Or it may be neceſſary, in ſettling an eſtate, to ſecure it againſt the claims of infants or other perſons under legal diſabilities; who are not bound by any judgements or decrees of the ordinary courts of juſtice. In theſe, or other caſes of the

the like kind, the tranſcendent power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpoſe, to unfetter an eſtate; to give it's tenant reaſonable powers; or to aſſure it to a purchaſor, againſt the remote or latent claims of infants or diſabled perſons, by ſettling a proper equivalent in proportion to the intereſt ſo barred. This practice was carried to a great length in the year ſucceeding the reſtoration; by ſetting aſide many conveyances alleged to have been made by conſtraint, or in order to ſcreen the eſtates from being forfeited during the uſurpation. And at laſt it proceeded ſo far, that, as the noble hiſtorian expreſſes it [a], every man had raiſed an equity in his own imagination, that he thought was entitled to prevail againſt any deſcent, teſtament or act of law, and to find relief in parliament: which occaſioned the king at the cloſe of the ſeſſion to remark [b], that the good old rules of law are the beſt ſecurity; and to wiſh, that men might not have too much cauſe to fear, that the ſettlements which they make of their eſtates ſhall be too eaſily unſettled when they are dead, by the power of parliament.

Acts of this kind are however at preſent carried on, in both houſes, with great deliberation and caution; particularly in the houſe of lords they are uſually referred to two judges to examine and report the facts alleged, and to ſettle all technical forms. Nothing alſo is done without the conſent, expreſsly given, of all parties in being and capable of conſent, that have the remoteſt intereſt in the matter; unleſs ſuch conſent ſhall appear to be perverſely and without any reaſon withheld. And, as was before hinted, an equivalent in money or other eſtate is uſually ſettled upon infants, or perſons not *in eſſe*, or not of capacity to act for themſelves, who are to be concluded by this act. And a general ſaving is conſtantly added, at the cloſe of the bill, of the right and intereſt of all perſons whatſoever; except thoſe whoſe conſent is ſo given or purchaſed, and who are therein particularly named: though it hath been holden, that, even if ſuch ſaving be omitted, the act ſhall bind none but the parties [c].

[a] Lord Clar. Contin. 162. [b] *Ibid.* 163. [c] Co. 138. Godb. 171.

A law,

A LAW, thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not therefore allowed to be a *publick*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against, when obtained upon fraudulent suggestions [c]; it hath been holden to be void, if contrary to law and reason [d]; and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains however enrolled among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established.

II. THE *king's grants* are also matter of public record. For, as St. Germyn says [e], the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or ought besides, are contained in charters, or letters *patent*, that is, open letters, *literae patentes*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close*, *literae clausae*, and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.

GRANTS or letters patent must first pass by *bill*: which is prepared by the attorney and solicitor general, in consequence

c Richardson v. Hamilton. *Canc.* 8 Jan. 1773. M'Kenzie v. Stuart. *Dom. Proc.* 13 Mar. 1754.

d 4 Rep. 12.

e Dr. & Stud. b. 1. d. 8.

of

of a warrant from the crown; and is then ſigned, that is, ſubſcribed at the top, with the king's own *ſign manual*, and ſealed with his *privy ſignet*, which is always in the cuſtody of the principal ſecretary of ſtate; and then ſometimes it immediately paſſes under the great ſeal, in which caſe the patent is ſubſcribed in theſe words, "*per ipſum regem*, by the king himſelf[d]." Otherwiſe the courſe is to carry an extract of the bill to the keeper of the *privy ſeal*, who makes out a writ or warrant thereupon to the chancery; ſo that the ſign manual is the warrant to the privy ſeal, and the privy ſeal is the warrant to the great ſeal: and in this laſt caſe the patent is ſubſcribed, "*per breve de privato ſigillo*, by writ of privy ſeal[e]." But there are ſome grants, which only paſs through certain offices, as the admiralty or treaſury, in conſequence of a *ſign manual*, without the confirmation of either the *ſignet*, the *great*, or the *privy* ſeal.

THE *manner* of granting by the king does not more differ from that by a ſubject, than the *conſtruction* of his grants, when made. 1. A grant made by the king, *at the ſuit of the grantee*, ſhall be taken moſt beneficially *for* the king, and *againſt* the party: whereas the grant of a ſubject is conſtrued moſt ſtrongly *againſt the grantor*. Wherefore it is uſual to inſert in the king's grants, that they are made, not at the ſuit of the grantee, but "*ex ſpeciali gratia, certa ſcientia, et mero motu regis*;" and then they have a more liberal conſtruction[f]. 2. A ſubject's grant ſhall be conſtrued to include many things, beſides what are expreſſed, if neceſſary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingreſs, egreſs, and regreſs, to cut and carry away thoſe profits, are alſo incluſively granted[g]: and if a feoffment of land was made by a lord to his villein, this operated as a manumiſſion[h]; for he was otherwiſe unable to hold it. But the king's grant ſhall not enure to any other intent, than that which is preciſely expreſſed in the grant. As, if he grants land to an alien, it operates nothing; for

[d] 9 Rep. 18.
[e] *Ibid.* 2 Inſt. 555.
[f] Finch. L. 100. 10 Rep. 112.
[g] Co. Litt. 56.
[h] Litt. § 206.

 ſuch

ſuch grant ſhall not alſo enure to make him a denizen, that ſo he may be capable of taking by grant [i]. 3. When it appears, from the face of the grant, that the king is miſtaken, or deceived, either in matter of fact or matter of law, as in caſe of falſe ſuggeſtion, miſinformation, or miſrecital of former grants; or if his own title to the thing granted be different from what he ſuppoſes; or if the grant be informal; or if he grants an eſtate contrary to the rules of law; in any of theſe caſes the grant is abſolutely void [k]. For inſtance; if the king grants lands to one and his *heirs male*, this is merely void: for it ſhall not be an eſtate-tail, becauſe there want words of procreation, to aſcertain the body out of which the heirs ſhall iſſue: neither is it a fee-ſimple, as in common grants it would be; becauſe it may reaſonably be ſuppoſed, that the king meant to give no more than an eſtate-tail [l]: the grantee is therefore (if any thing) nothing more than tenant at will [m]. And, to prevent deceits of the king, with regard to the value of the eſtate granted, it is particularly provided by the ſtatute 1 Hen. IV. c. 6. that no grant of his ſhall be good, unleſs in the grantee's petition for them, expreſs mention be made of the real value of the lands.

III. WE are next to conſider a very uſual ſpecies of aſſurance, which is alſo of record; *viz.* a *fine* of lands and tenements. In which it will be neceſſary to explain, 1. The *nature* of a fine; 2. It's ſeveral *kinds*; and 3. It's *force* and *effect*.

1. A FINE is ſometimes ſaid to be a feoffment of record [n]: though it might with more accuracy be called, an acknowlegement of a feoffment on record. By which is to be underſtood, that it has at leaſt the ſame force and effect with a feoffment, in the conveying and aſſuring of lands: though it is one of thoſe methods of transferring eſtates of freehold by the common law, in which livery of ſeiſin is not neceſſary

i Bro. *Abr. tit. Patent.* 62. Finch. L. 110.

k Freem. 172.

l Finch. 101, 102.

m Bro. *Abr. tit. Eſtates.* 34. *tit. Patents.* 104. Dyer. 270. Dav. 45.

n Co. Litt. 50.

to be actually given; the ſuppoſition and acknowlegement thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be deſcribed to be an amicable compoſition or agreement of a ſuit, either actual or fictitious, by leave of the king or his juſtices; whereby the lands in queſtion become, or are acknowleged to be, the right of one of the parties [o]. In it's original it was founded on an actual ſuit, commenced at law for recovery of the poſſeſſion of land or other hereditaments; and the poſſeſſion thus gained by ſuch compoſition was found to be ſo ſure and effectual, that fictitious actions were, and continue to be, every day commenced, for the ſake of obtaining the ſame ſecurity.

A FINE is ſo called becauſe it puts an *end*, not only to the ſuit thus commenced, but alſo to all other ſuits and controverſies concerning the ſame matter. Or, as it is expreſſed in an antient record of parliament [p], 18 Edw. I. "*non in regno* "*Angliæ providetur, vel eſt, aliqua ſecuritas major vel ſolennior,* "*per quam aliquis ſtatum certiorem habere poſſit, neque ad ſtatum* "*ſuum verificandum aliquod ſolennius teſtimonium producere,* "*quam finem in curia domini regis levatum: qui quidem finis ſic* "*vocatur, eo quod finis et conſummatio omnium placitorum eſſe* "*debet, et hac de cauſa providebatur.*" Fines indeed are of equal antiquity with the firſt rudiments of the law itſelf; are ſpoken of by Glanvil [q] and Bracton [r] in the reigns of Henry II, and Henry III, as things then well known and long eſtabliſhed; and inſtances have been produced of them even prior to the Norman invaſion [s]. So that the ſtatute 18 Edw. I. called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they ſhould be levied, or carried on. And that is as follows:

1. THE party, to whom the land is to be conveyed or aſſured, commences an action or ſuit at law againſt the other,

[o] Co. Litt. 120.
[p] 2 Roll. Abr. 13.
[q] *l.* 8. *c.* 1.
[r] *l.* 5. *t.* 5. c 28.
[s] Plowd. 369.

generally an action of covenant[t], by suing out a writ of *praecipe*, called a writ of covenant[v]: the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by antient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one-tenth of the annual value[u]. The suit being thus commenced, then follows,

2. THE *licentia concordandi*, or leave to agree the suit[w]. For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative, which is an ancient revenue of the crown, and is called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before-mentioned. And it is as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, three-twentieths of the supposed annual value[x].

3. NEXT comes the *concord*, or agreement itself[y], after leave obtained from the court; which is usually an acknowlegement from the deforciants (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowlegement, or recognition of right, the party levying the fine is called the

t A fine may also be levied on a writ of *mesne*, of *warrantia chartae*, or *de consuetudinibus et servitiis*. (Finch. L. 278.)

v See appendix. N°. IV. § 1.

u 2 Inst. 511.

w Append. N°. IV. § 2. In the times of strict feodal jurisdiction, if a vasal had commenced a suit in the lord's court, he could not abandon it without leave; lest the lord should be deprived of his perquisites for deciding the cause. (Robertson. Cha. V. i. 31.)

x 5 Rep. 39. 2 Inst. 511. Stat. 32 Geo. II. c. 14.

y Append. N°. IV. § 3.

cognizor,

cognizor, and he to whom it is levied the *cognizee*. This acknowlegement muſt be made either openly in the court of common pleas, or before the lord chief juſtice of that court; or elſe before one of the judges of that court, or two or more commiſſioners in the country, empowered by a ſpecial authority called a writ of *dedimus poteſtatem*; which judges and commiſſioners are bound by ſtatute 18 Edw. I. ſt. 4. to take care that the cognizors be of full age, ſound memory, and out of priſon. If there be any feme-covert among the cognizors, ſhe is privately examined whether ſhe does it willingly and freely, or by compulſion of her huſband.

By theſe acts all the eſſential parts of a fine are completed: and, if the cognizor dies the next moment after the fine is acknowleged, provided it be ſubſequent to the day on which the writ is made returnable [z], ſtill the fine ſhall be carried on in all it's remaining parts: of which the next is

4. The *note* of the fine [a]; which is only an abſtract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This muſt be enrolled of record in the proper office, by direction of the ſtatute 5 Hen. IV. c. 14.

5. The fifth part is the *foot* of the fine, or concluſion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowleged or levied [b]. Of this there are indentures made, or engroſſed, at the chirographer's office, and delivered to the cognizor and the cognizee; uſually beginning thus, "*haec eſt finalis* "*concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

By ſeveral ſtatutes ſtill more ſolemnities are ſuperadded, in order to render the fine more univerſally public, and leſs

[z] Comb. 71.
[a] Append. N°. IV. § 4.
[b] *Ibid.* § 5.

liable to be levied by fraud or covin. And, first, by 27 Edw. I. c. 1. the note of the fine shall be openly read in the court of common pleas, at two several days in one week, and during such reading all pleas shall cease. By 5 Hen. IV. c. 14. and 23 Eliz. c. 3. all the proceedings on fines, either at the time of acknowlegement, or previous, or subsequent thereto, shall be enrolled of record in the court of common pleas. By 1 Ric. III. c. 7. confirmed and enforced by 4 Hen. VII. c. 24. the fine, after engrossment, shall be openly read and proclaimed in court (during which all pleas shall cease) sixteen times; *viz.* four times in the term in which it is made, and four times in each of the three succeeding terms; which is reduced to once in each term by 31 Eliz. c. 2. and these proclamations are indorsed on the back of the record [c]. It is also enacted by 23 Eliz. c. 3. that the chirographer of fines shall every term write out a table of the fines levied in each county in that term, and shall affix them in some open part of the court of common pleas all the next term: and shall also deliver the contents of such table to the sheriff of every county, who shall at the next assises fix the same in some open place in the court, for the more public notoriety of the fine.

2. FINES, thus levied, are of four kinds. 1. What in our law French is called a fine "*sur cognizance de droit, come* "*ceo que il ad de son done;*" or, a fine upon acknowlegement of the right of the cognizee, as that which he hath of the gift of the cognizor [d]. This is the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowleges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery, thus acknowleged in court, being equi-

[c] Append. N°. IV. § 6.

[d] This is that sort, of which an example is given in the appendix, N°. IV.

valent

valent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant, or cognizor, acknowleges, *cognoscit*, the right to be in the plaintiff, or cognizee, as that [353] which he hath *de son done*, of the proper gift of himself, the cognizor. 2. A fine "*sur cognizance de droit tantum*," or, upon acknowlegement of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third person [e]. It is worded in this manner; "that the cognizor acknowleges "the right to be in the cognizee; and grants for himself and "his heirs, that the reversion, after the particular estate de-"termines, shall go to the cognizee [f]." 3. A fine "*sur concessit*" is where the cognizor, in order to make an end of disputes, though he acknowleges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like: for it operates as a new grant [g]. 4. A fine "*sur done, grant, et render*," is a double fine, comprehending the fine *sur cognizance de droit come ceo, &c*, and the fine *sur concessit*: and may be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo, &c.* conveys nothing but an absolute estate, either of inheritance or at least of freehold [h]. In this last species of fine, the cognizee, after the right is acknowleged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine, *sur cognizance de droit come ceo, &c.* is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

[e] Moor. 629.

[f] West. Symb. p. 2. § 95.

[g] West. p. 2. § 66.

[h] Salk. 340.

3. WE are next to conſider the *force* and *effect* of a fine. Theſe principally depend, at this day, on the common law, and the two ſtatutes, 4 Hen. VII. c. 24. and 32 Hen. VIII.
[354] c. 36. The antient common law, with reſpect to this point, is very forcibly declared by the ſtatute 18 Edw. I. in theſe words. "And the reaſon, why ſuch ſolemnity is required "in the paſſing of a fine, is this; becauſe the fine is ſo high "a bar, and of ſo great force, and of a nature ſo powerful "in itſelf, that it precludes not only thoſe which are parties "and privies to the fine, and their heirs, but all other per-"ſons in the world, who are of full age, out of priſon, of "ſound memory, and within the four ſeas, the day of the "fine levied; unleſs they put in their claim on the foot[h] of "the fine within a year and a day." But this doctrine, of barring the right by *non-claim*, was aboliſhed for a time by a ſtatute made in 34 Edw. III. c. 16. which admitted perſons to claim, and falſify a fine, at any indefinite diſtance[i]: whereby, as ſir Edward Coke obſerves[k], great contention aroſe, and few men were ſure of their poſſeſſions, till the parliament held 4 Hen. VII. reformed that miſchief, and excellently moderated between the latitude given by the ſtatute and the rigour of the common law. For the ſtatute, then made[l], reſtored the doctrine of non-claim; but extended the time of claim. So that now, by that ſtatute, the right of all ſtrangers whatſoever is bound, unleſs they make claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years after proclamations made: except feme-coverts, infants, priſoners, perſons beyond the ſeas, and ſuch as are not of whole mind; who have five years allowed to them and their heirs, after the death of their huſbands, their attaining full age, reco-

h *Sur la pie* as it is in the Cotton MS. and not *pur le pais* as printed by Berthelet and in 2 Inſt. 511. There were then four methods of claiming, ſo as to avoid being concluded by a fine: 1. By action. 2. By entring ſuch claim on the record at the *foot* of the fine. 3. By entry on the lands. 4. By continual claim. 2 Inſt. 518. The ſecond is not now in force under the ſtatute of Henry VII.

i Litt. § 441.

k 2 Inſt. 518.

l 4 Hen. VII. c. 24. See page 118.

vering

vering their liberty, returning into England, or being reſtored to their right mind (1).

It ſeems to have been the intention of that politic prince, king Henry VII, to have covertly by this ſtatute extended fines to have been a bar of eſtates tail, in order to unfetter the more eaſily the eſtates of his powerful nobility, and lay them more open to alienations; being well aware that power will always accompany property. But doubts having ariſen whether they could, by mere implication, be adjudged a ſufficient bar, (which they were expreſsly declared *not* to be by [355] the ſtatute *de donis*) the ſtatute 32 Hen. VIII. c. 36. was thereupon made; which removes all difficulties, by declaring that a fine levied by any perſon of full age, to whom or to whoſe anceſtors lands have been entailed, ſhall be a perpetual bar to them and their heirs claiming by force of ſuch entail: unleſs the fine be levied by a woman after the death of her huſband, of lands which were, by the gift of him or his anceſtors, aſſigned to her in tail for her jointure [m]; or unleſs it be of lands entailed by act of parliament or letters patent, and whereof the reverſion belongs to the crown.

From this view of the common law, regulated by theſe ſtatutes, it appears, that a fine is a ſolemn conveyance on record from the cognizor to the cognizee, and that the perſons bound by a fine are *parties*, *privies*, and *ſtrangers*.

The *parties* are either the cognizors, or cognizees; and theſe are immediately concluded by the fine, and barred of

m See ſtatute 11 Hen. VII. c. 20.

(1) This is the chief excellence and uſe of a fine, that it confirms and ſecures a ſuſpicious title, and puts an end to all litigation after five years. Other conveyances and aſſurances admit an entry to be made upon the eſtate within twenty years, and in ſome inſtances, the right to be diſputed in a real action for ſixty years afterwards. *Harg. Co. Litt.* 121. *a. n.* 1.

any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almoſt the only act that a *feme-covert*, or married woman, is permitted by law to do, (and that becauſe ſhe is privately examined as to her voluntary conſent, which removes the general ſuſpicion of compulſion by her huſband) it is therefore the uſual and almoſt the only ſafe method, whereby ſhe can join in the ſale, ſettlement, or incumbrance, of any eſtate (2).

PRIVIES to a fine are ſuch as are any way related to the parties who levy the fine, and claim under them by any right of blood, or other right of repreſentation. Such as are the heirs general of the cognizor, the iſſue in tail ſince the ſtatute of Henry the eighth, the vendee, the deviſee, and all others who muſt make title by the perſons who levied the fine. For the act of the anceſtor ſhall bind the heir, and the act of the principal his ſubſtitute, or ſuch as claim under any conveyance made by him ſubſequent to the fine ſo levied [n].

[356] STRANGERS to a fine are all other perſons in the world, except only parties and privies. And theſe are alſo bound by a fine, unleſs, within five years after proclamations made, they interpoſe their claim; provided they are under no legal impediments, and have then a preſent intereſt in the eſtate. The impediments, as hath before been ſaid, are coverture, infancy, impriſonment, inſanity, and abſence beyond ſea: and perſons, who are thus incapacitated to proſecute their rights,

[n] 3 Rep. 87.

(2) A wife may join her huſband in either a fine or recovery to convey her own eſtate and inheritance, or an eſtate ſettled upon her by her huſband as her jointure, or to convey the huſband's eſtates diſcharged of dower. 1 *Cru.* 99. 2 *Cru.* 143. *Pig.* 123. But if a jointreſs, after her huſband's death, levies a fine or ſuffers a recovery without the conſent of the heir, or the next perſon entitled to an eſtate of inheritance, the fine or recovery is void, and is alſo a forfeiture of her eſtate. 11 *Hen, VII. c.* 20. *Pig.* 75.

have

have five years allowed them to put in their claims after ſuch impediments are removed. Perſons alſo that have not a preſent, but a future intereſt only, as thoſe in remainder or reverſion, have five years allowed them to claim in, from the time that ſuch right accrues [o]. And if within that time they neglect to claim, or (by the ſtatute 4 Ann. c. 16.) if they do not bring an action to try the right, within one year after making ſuch claim, and proſecute the ſame with effect, all perſons whatſoever are barred of whatever right they may have, by force of the ſtatute of non-claim.

BUT, in order to make a fine of any avail at all, it is neceſſary that the parties ſhould have ſome intereſt or eſtate in the lands to be affected by it. Elſe it were poſſible that two ſtrangers, by a mere confederacy, might without any riſque defraud the owners by levying fines of their lands; for if the attempt be diſcovered, they can be no ſufferers, but muſt only remain *in ſtatu quo:* whereas if a tenant for life levies a fine, it is an abſolute forfeiture of his eſtate to the remainder-man or reverſioner [p], if claimed in proper time. It is not therefore to be ſuppoſed that ſuch tenants will frequently run ſo great a hazard; but if they do, and the claim is not duly made within five years after their reſpective terms expire [q], the eſtate is for ever barred by it. Yet where a ſtranger, whoſe preſumption cannot be thus puniſhed, officiouſly interferes in an eſtate which in no wiſe belongs to him, his fine is of no effect; and may at any time be ſet aſide (unleſs by ſuch as are parties or privies thereunto [r]) by pleading that "*partes finis nihil habuerunt.*" And, even if a tenant for years, who hath only a chattel intereſt, and no freehold in the land, levies a fine, it operates nothing, but is liable to be defeated by the ſame plea [s]. Wherefore, when a leſſee for years is diſpoſed to levy a fine, it is uſual for him to make a feoffment firſt, to diſplace the eſtate of the reverſioner [t], and create a new freehold by diſſeiſin. And thus much [357]

o Co. Litt. 372.
p *Ibid.* 251.
q 2 Lev. 52.
r Hob. 334.
s 5 Rep. 123. Hardr. 401.
t Hardr. 402. 2 Lev. 52.

for

for the conveyance or aſſurance by fine: which not only, like other conveyances, binds the grantor himſelf, and his heirs; but alſo all mankind, whether concerned in the tranſfer or no, if they fail to put in their claims within the time allotted by law (3).

IV. THE fourth ſpecies of aſſurance, by matter of record, is a *common recovery*. Concerning the original of which it was formerly obſerved[u], that common recoveries were invented by the eccleſiaſtics to elude the ſtatutes of mortmain; and afterwards encouraged by the fineſſe of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only eſtates-tail, but alſo all remainders and reverſions expectant thereon. I am now therefore only to conſider, firſt, the *nature* of a common recovery; and, ſecondly, it's *force* and *effect*.

1. AND, firſt, the *nature* of it; or what a common recovery is. A common recovery is ſo far like a fine, that it

[u] pag. 117. 271.

(3) It is not neceſſary to be in poſſeſſion of the freehold in order to levy a fine; but if any one entitled to the inheritance, or to a remainder in tail, levies a fine, it will bar his iſſue and all heirs who derive their title through him. *Hob.* 333. A fine by tenant in tail does not affect ſubſequent remainders, but it creates a baſe or qualified fee, determinable upon the failure of the iſſue of the perſon to whom the eſtate was granted in tail; upon which event the remainder-man may enter. If tenant in tail, with an immediate reverſion in fee, levies a fine, the baſe fee merges in the reverſion, which will become liable to all the incumbrances of the anceſtors, from whom the eſtate tail deſcended; as judgments, recognizances, and ſuch leaſes as are void with reſpect to the iſſue in tail. 5 *T. R.* 108. 1 *Cru.* 274. A recovery ſuffered by any tenant in tail lets in all the incumbrances created by himſelf, which were defeaſible by the iſſue in tail, and after the recovery they will follow the lands in the hands of a *bonâ fide* purchaſor. *Pig.* 120. 2 *Cru.* 287.

is a ſuit or action, either actual or fictitious: and in it the lands are *recovered* againſt the tenant of the freehold; which recovery, being a ſuppoſed adjudication of the right, binds all perſons, and veſts a free and abſolute fee-ſimple in the recoveror. A recovery therefore being in the nature of an action at law, not immediately compromiſed like a fine, but carried on through every regular ſtage of proceeding, I am greatly apprehenſive that it's form and method will not be eaſily underſtood by the ſtudent, who is not yet acquainted with the courſe of judicial proceedings; which cannot be thoroughly explained, till treated of at large in the third [358] book of theſe commentaries. However I ſhall endeavour to ſtate it's nature and progreſs, as clearly and conciſely as I can; avoiding, as far as poſſible, all technical terms, and phraſes not hitherto interpreted.

LET us, in the firſt place, ſuppoſe David Edwards [w] to be tenant of the freehold, and deſirous to ſuffer a common recovery, in order to bar all entails, remainders, and reverſions, and to convey the ſame in fee-ſimple to Francis Golding. To effect this, Golding is to bring an action againſt him for the lands; and he accordingly ſues out a writ, called a *praecipe quod reddat*, becauſe thoſe were it's initial or moſt operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges, that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into poſſeſſion of it after one Hugh Hunt had turned the demandant out of it [x]. The ſubſequent proceedings are made up into a record or recovery roll [y], in which the writ and complaint of the demandant are firſt recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is ſuppoſed, at the original purchaſe, to have warranted the title to the tenant; and thereupon he prays, that the ſaid Jacob Morland may be called in to defend the title which he ſo war-

w See appendix, No. V. x § 1. y § 2.

ranted.

ranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, desires leave of the court to *imparl*, or confer with the vouchee in private; which is (as usual) allowed him. And soon afterwards the demandant, Golding, returns to court, but Morland the vouchee disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question against the tenant, Edwards, who is now the recoveree: and Edwards has judgment to recover of Jacob Morland
[359] lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter [z]. This is called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the cryer of the court (who, from being frequently thus vouched, is called the *common vouchee*) it is plain that Edwards has only a nominal recompense for the lands so recovered against him by Golding; which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding the purchasor.

THE recovery, here described, is with a *single* voucher only; but sometimes it is with *double*, *treble*, or farther voucher, as the exigency of the case may require. And indeed it is now usual always to have a recovery with double voucher at the least: by first conveying an estate of freehold to any indifferent person, against whom the *praecipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee [a]. For, if a recovery be

[z] pag. 301.

[a] See append'x, pag. xviii.

had

had immediately againſt tenant in tail, it bars only ſuch eſtate in the premiſes of which he is then actually ſeiſed; whereas if the recovery be had againſt another perſon, and the tenant in tail be vouched, it bars every latent right and intereſt which he may have in the lands recovered [b]. If Edwards therefore be tenant of the freehold in poſſeſſion, and John Barker be tenant in tail in remainder, here Edwards doth firſt vouch Barker, and then Barker vouches Jacob Morland the common vouchee; who is always the laſt perſon vouched, and always makes default: whereby the demandant Golding recovers the land againſt the tenant Edwards, and Edwards recovers a recompenſe of equal value againſt Barker the firſt vouchee; who recovers the like againſt Morland the common vouchee, againſt whom ſuch ideal recovery in value is always ultimately awarded.

THIS ſuppoſed recompenſe in value is the reaſon why the iſſue in tail is held to be barred by a common recovery. For, if the recoveree ſhould obtain a recompenſe in lands from the common vouchee (which there is a poſſibility in contemplation of law, though a very improbable one, of his doing) theſe lands would ſupply the place of thoſe ſo recovered from him by colluſion, and would deſcend to the iſſue in tail [c]. This reaſon will alſo hold with equal force, as to *moſt* remainder-men and reverſioners; to whom the poſſibility will remain and revert, as a full recompenſe for the reality, which they were otherwiſe entitled to: but it will not *always* hold; and therefore, as Pigott ſays [d], the judges have been even *aſtuti*, in inventing other reaſons to maintain the authority of recoveries. And, in particular, it hath been ſaid, that, though the eſtate-tail is gone from the recoveree, yet it is not *deſtroyed*, but only *transferred*; and ſtill ſubſiſts, and will ever continue to ſubſiſt (by conſtruction of law) in the recoveror, his heirs, and aſſigns: and, as the eſtate-tail ſo continues to ſubſiſt for ever, the remainders or reverſions [360]

b Bro. *Abr. tit. Taile.* 32. Plowd. 8.
c Dr & St. b. 1. dial. 26.
d of com. recov. 13, 14.

expectant

expectant on the determination of ſuch eſtate-tail can never take place (4).

To ſuch awkward ſhifts, ſuch ſubtile refinements, and ſuch ſtrange reaſoning, were our anceſtors obliged to have recourſe, in order to get the better of that ſtubborn ſtatute *de donis*. The deſign, for which theſe contrivances were ſet on foot, was certainly laudable; the unrivetting the fetters of eſtates-tail, which were attended with a legion of miſchiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Our modern courts of juſtice have indeed adopted a more manly way of treating the ſubject; by conſidering common recoveries in no other light, than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands. But, ſince the ill conſequences of fettered inheritances are now generally ſeen and allowed, and of courſe the utility and expedience of ſetting them at liberty are apparent; it hath often been wiſhed, that
[361] the proceſs of this conveyance was ſhortened, and rendered leſs ſubject to niceties, by either totally repealing the ſtatute *de donis*; which perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or by veſting in every tenant in tail of full age the ſame abſolute fee-ſimple at once, which now he may obtain whenever he

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(4) Fines and recoveries are now conſidered as mere forms of conveyances or common aſſurances, the theory and original principles of them being little regarded. Chief juſtice Willes has declared that "Mr. Pigot has confounded himſelf and every body "elſe who reads his book, by endeavouring to give reaſons for "and explain common recoveries. I only ſay this," he adds "to ſhew "that when men attempt to give reaſons for common recoveries "they run into abſurdities, and the whole of what they ſay is unin"telligible jargon and learned nonſenſe. They have been in uſe "ſome hundreds of years, have gained ground by time, and we "muſt now take them, as they really are common aſſurances." 1 *Wilſ*. 73.

pleases, by the collusive fiction of a common recovery; though this might possibly bear hard upon those in remainder or reversion, by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time and enrolled in some court of record; which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, and the decisions of our own courts of justice, which allow a tenant in tail (without fine or recovery) to appoint his estate to any *charitable* use [e], but also by the precedent of the statute [f] 21 Jac. I. c. 19. which, in case of a bankrupt tenant in tail, empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And if, in so national a concern, the emoluments of the officers, concerned in passing recoveries, are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrollment.

2. THE *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But, by statute 34 & 35 Hen. VIII. c. 20. no recovery had against tenant in tail, of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate-tail, or the remainder or reversion of the crown. And by the statute 11 Hen. VII. c. 20. no woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors. And by statute 14 Eliz. c. 8. no tenant for life, of [362]
any sort, can suffer a recovery, so as to bind them in remain-

e See pag. 376.

f See pag. 286.

der or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid recovery; either he, or the tenant to the *praecipe* by him made, must *vouch* the remainder-man in tail, otherwise the recovery is void: but if he does vouch such remainder-man, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears, and suffers the recovery to be had against the tenant to the *praecipe*, it is as effectual to bar the estate-tail as if he himself were the recoveree [f] (5).

IN all recoveries it is necessary that the recoveree, or tenant to the *praecipe*, as he is usually called, be actually seised of the freehold, else the recovery is void [g]. For all actions, to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose it's effect; since the freehold cannot be recovered of him who has it not. And, though these recoveries are in themselves fabulous and fictitious, yet it is necessary that there be *actores fabulae*, properly qualified. But the nicety thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *praecipe*, is removed by the provisions of the statute 14 Geo. II. c. 20. which enacts, with a retrospect and

[f] Salk. 571. [g] Pigot. 28.

(5) If a tenant in tail, to whom the estate has descended *ex parte materna*, suffers a recovery, and declares the uses to himself in fee, the estate will descend to an heir on the part of the mother, even if he had the reversion in fee from his father, aud *vice versa*; but if he took the estate-tail by purchase, the new fee will descend to the heirs general. 5 *T. R.* 104. If then a person, who has inherited an estate-tail from his mother, wishes to cut off the intail and to make the estate descendible to his heirs on the part of the father, after the recovery he ought to make a common conveyance to trustees, and to have the estate reconveyed back by them, by which means he will take the estate by purchase, which will then descend to his heirs general.

conformity

conformity to the antient rule of law[h], that, though the legal freehold be veſted in leſſees, yet thoſe who are entitled to the next freehold eſtate in remainder or reverſion may make a good tenant to the *praecipe*;—that, though the deed or fine which creates ſuch tenant be ſubſequent to the judgment of recovery, yet, if it be in the ſame term, the recovery ſhall be valid in law;—and that, though the recovery itſelf do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the *praecipe*, and declare the uſes of the recovery, ſhall after a poſſeſſion of twenty years be ſufficient evidence, on behalf of a purchaſor for valuable conſideration, [363] that ſuch recovery was duly ſuffered. And this may ſuffice to give the ſtudent a general idea of common recoveries, the laſt ſpecies of aſſurances by matter of record.

BEFORE I conclude this head, I muſt add a word concerning deeds to *lead*, or to *declare*, the *uſes* of fines, and of recoveries. For if they be levied or ſuffered without any good conſideration, and without any uſes declared, they, like other conveyances, enure only to the uſe of him who levies or ſuffers them[i]. And if a conſideration appears, yet as the moſt uſual fine, "*ſur cognizance de droit come ceo, &c.*" conveys an abſolute eſtate, without any limitations, to the cognizee; and as common recoveries do the ſame to the recoveror, theſe aſſurances could not be made to anſwer the purpoſe of family ſettlements, (wherein a variety of uſes and deſignations is very often expedient) unleſs their force and effect were ſubjected to the direction of other more complicated deeds, wherein particular uſes can be more particularly expreſſed. The fine or recovery itſelf, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements in the vaſt and intricate machine of a voluminous family ſettlement. And, if theſe deeds are made previous to the fine or recovery, they are called deeds to *lead* the uſes; if ſubſequent, deeds to *declare* them. As, if A tenant in tail, with reverſion to himſelf in fee, would ſettle his eſtate

h Pigott. 41, *&c.* 4 Burr. l. 115.

i Dyer. 18.

on B for life, remainder to C in tail, remainder to D in fee; this is what by law he has no power of doing effectually, while his own eſtate-tail is in being. He therefore uſually, after making the ſettlement propoſed, covenants to levy a fine (or if there be any intermediate remainders, to ſuffer a recovery) to E, and directs that the ſame ſhall enure to the uſes in ſuch ſettlement mentioned. This is now a deed to *lead* the uſes of the fine or recovery; and the fine when levied, or recovery when ſuffered, ſhall enure to the uſes ſo ſpecified and no other. For though E, the cognizee or recoveror, hath a fee-ſimple veſted in himſelf by the fine or recovery; yet, by the operation of this deed, he becomes a mere inſtrument or conduit-
[364] pipe, ſeiſed only *to the uſe* of B, C, and D, in ſucceſſive order: which uſe is executed immediately, by force of the ſtatute of uſes[k]. Or, if a fine or recovery be had without any previous ſettlement, and a deed be *afterwards* made between the parties, *declaring* the uſes to which the ſame ſhall be applied, this will be equally good, as if it had been expreſsly levied or ſuffered

[k] This doctrine may perhaps be more clearly illuſtrated by example. In the deed or marriage ſettlement in the appendix, N°. II. § 2. we may ſuppoſe the lands to have been originally ſettled on Abraham and Cecilia Barker for life, remainder to John Barker in tail, with divers other remainders over, reverſion to Cecilia Barker in fee; and now intended to be ſettled to the ſeveral uſes therein expreſſed, *viz.* to Abraham and Cecilia Barker till the marriage of John Barker with Katherine Edwards, and then to John Barker for life; remainder to truſtees to preſerve the contingent remainders; remainder to his wife Katherine for life, for her jointure; remainder to other truſtees, for a term of five hundred years; remainder to the firſt and other ſons of the marriage in tail; remainder to the daughters in tail; remainder to John Barker in tail; remainder to Cecilia Barker in fee. Now it is neceſſary, in order to bar the eſtate tail of John Barker, and the remainders expectant thereon, that a recovery be ſuffered of the premiſes: and it is thought proper (for though uſual, it is by no means neceſſary: ſee Forreſter. 167.) that in order to make a good tenant of the freehold, or tenant to the *praecipe*, during the coverture, a fine ſhould be levied by Abraham, Cecilia, and John Barker; and that the recovery itſelf be ſuffered againſt this tenant to the *praecipe*, who ſhall vouch John Barker, and thereby bar his eſtate-tail, and become tenant to the fee-ſimple by virtue of ſuch recovery: the uſes of which eſtate, ſo acquired, are to be thoſe expreſſed in this deed. Accordingly the parties covenant to do theſe ſeveral acts: (ſee pag. viii.) and in conſequence thereof the fine and recovery are had and ſuffered (N°. IV. and N°. V.) of which this conveyance is a deed to *lead* the uſes.

in conſequence of a deed directing it's operation to thoſe particular uſes. For by ſtatute 4 & 5 Ann. c. 16. indentures to *declare* the uſes of fines and recoveries, made *after* the fines and recoveries had and ſuffered, ſhall be good and effectual in law, and the fine and recovery ſhall enure to ſuch uſes, and be eſteemed to be only in truſt, notwithſtanding any doubts that had ariſen on the ſtatute of frauds 29 Car. II. c. 3. to the contrary.

CHAPTER THE TWENTY-SECOND.

OF ALIENATION BY SPECIAL CUSTOM.

WE are next to confider affurances by fpecial cuftom, obtaining only in particular places, and relative only to a particular fpecies of real property. This therefore is a very narrow title; being confined to copyhold lands, and fuch cuftomary eftates, as are holden in antient demefne, or in manors of a fimilar nature: which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed; for, as that might tend to defeat the lord of his feigniory, it is therefore a forfeiture of a copyhold[a]. Nor are they transferrable by matter of record, even in the king's courts, but only in the court baron of the lord. The method of doing this is generally by *furrender*; though in fome manors, by fpecial cuftom, recoveries may be fuffered of copyholds[b]: but thefe differing in nothing material from recoveries of free land, fave only that they are not fuffered in the king's courts, but in the court baron of the manor, I fhall confine myfelf to conveyances by furrender, and their confequences.

SURRENDER, *furfumredditio*, is the yielding up of the eftate by the tenant into the hands of the lord, for fuch purpofes as in the furrender are expreffed. As, it may be, to the ufe and behoof of A and his heirs; to the ufe of his own will; and the like. The procefs, in moft manors, is, that the

a Litt. § 74. b Moor. 637.

tenant

tenant comes to the ſteward, either in court, (or, if the cuſtom permits, out of court) or elſe to two cuſtomary tenants of the ſame manor, provided there be alſo a cuſtom to warrant it; and there by delivering up a rod, a glove, or other ſymbol, as the cuſtom directs, reſigns into the hands of the lord, by the hands and acceptance of his ſaid ſteward, or of the ſaid two tenants, all his intereſt and title to the eſtate; in truſt to be again granted out by the lord, to ſuch perſons and for ſuch uſes as are named in the ſurrender, and the cuſtom of the manor will warrant. If the ſurrender be made out of court, then, at the next or ſome ſubſequent court, the jury or homage muſt preſent and find it upon their oaths; which preſentment is an information to the lord or his ſteward of what has been tranſacted out of court. Immediately upon ſuch ſurrender in court, or upon preſentment of a ſurrender made out of court, the lord by his ſteward grants the ſame land again to *ceſtuy que uſe*, (who is ſometimes, though rather improperly, called the ſurrenderee) to hold by the antient rents and cuſtomary ſervices; and thereupon admits him tenant to the copyhold, according to the form and effect of the ſurrender, which muſt be exactly purſued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the ſymbol, of corporal ſeiſin of the lands and tenements. Upon which admiſſion he pays a fine to the lord according to the cuſtom of the manor, and takes the oath of fealty.

IN this brief abſtract of the manner of transferring copyhold eſtates we may plainly trace the viſible footſteps of the feodal inſtitutions. The fief, being of a baſe nature and tenure, is unalienable without the knowlege and conſent of the lord. For this purpoſe it is reſigned up, or ſurrendered into his hands. Cuſtom, and the indulgence of the law, which favours liberty, has now given the tenant a right to name his ſucceſſor; but formerly it was far otherwiſe. And I am apt to ſuſpect that this right is of much the ſame antiquity with the introduction of uſes with reſpect to freehold lands: for the alienee of a copyhold had merely *jus fiduciarium*, for which

 there

there was no remedy at law, but only by *ſub-poena* in chancery [c]. When therefore the lord had accepted a ſurrender of his tenant's intereſt, upon confidence to re-grant the eſtate to another perſon, either then expreſsly named or to be afterwards named in the tenant's will, the chancery inforced this truſt as a matter of conſcience; which juriſdiction, though ſeemingly new in the time of Edward IV [d], was generally acquieſced in, as it opened the way for the alienation of copyholds, as well as of freehold eſtates, and as it rendered the *uſe* of them both equally deviſable by teſtament. Yet even to this day, the new tenant cannot be admitted but by compoſition with the lord, and paying him a fine by way of acknowlegement for the licence of alienation. Add to this the plain feodal inveſtiture, by delivering the ſymbol of ſeiſin in preſence of the other tenants in open court; "*quando haſta vel aliud corporeum quid-*" *libet porrigitur a domino ſe inveſtituram facere dicente; quae* "*ſaltem coram duobus vaſallis ſolemniter fieri debet* [e]:" and, to crown the whole, the oath of fealty is annexed, the very bond of feodal ſubjection. From all which we may fairly conclude, that had there been no other evidence of the fact in the reſt of our tenures and eſtates, the very exiſtence of copyholds, and the manner in which they are transferred, would inconteſtably prove the very univerſal reception which this northern ſyſtem of property for a long time obtained in this iſland; and which communicated itſelf, or at leaſt it's ſimilitude, even to our very villeins and bondmen.

THIS method of conveyance is ſo eſſential to the nature of a copyhold eſtate, that it cannot properly be transferred by any other aſſurance. No feoffment or grant has any operation thereupon. If I would exchange a copyhold eſtate with another, I cannot do it by an ordinary deed of exchange at the common law; but we muſt ſurrender to each other's uſe, and the lord will admit us accordingly. If I would deviſe a copyhold, I muſt ſurrender it to the uſe of my laſt will and teſtament; and in my will I muſt declare my in-

c Cro. Jac. 568.

d Bro. *Abr. tit. Tenant. per copie.* 10.

e *Feud. l.* 2. *t.* 2.

tentions,

tentions, and name a devifee, who will then be entitled to admiffion[f] (1). A fine or recovery had of copyhold lands in the king's court may indeed, if not duly reverfed, alter the tenure of the lands, and convert them into frank fee[g], which is defined in the old book of tenures[h] to be "land pleadable at the "common law:" but upon an action on the cafe, in the nature of a writ of a *deceit*, brought by the lord in the king's court, fuch fine or recovery will be reverfed, the lord will recover his jurifdiction, and the lands will be reftored to their former ftate of copyhold[i].

In order the more clearly to apprehend the nature of this peculiar affurance, let us take a feparate view of it's feveral parts; the furrender, the prefentment, and the admittance.

1. A SURRENDER, by an admittance fubfequent whereto the conveyance is to receive it's perfection and confirmation, is rather a manifeftation of the alienor's intention, than a transfer of any intereft in poffeffion. For, till admittance of *ceftuy que ufe*, the lord taketh notice of the furrenderor as his

f Co. Copyh. § 36.

g Old. *Nat. Brev. t. briefe de recto clauſo.* F. N. B. 13.

h *t. tenir en franke fee.*

i See Vol. III. p. 166*.

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(1) Unlefs a furrender is made by the teftator fome time before his death to the ufe of his laft will and teftament, the devife of a copyhold is in general abfolutely void, and the eftate defcends to the heir at law: but in three inftances a court of equity will interfere and will fupply the defect of a furrender, *viz.* when copyholds are devifed for the payment of debts, and in favour of a wife or younger children. Yet a wife or younger children will not be relieved in equity, if the heir is difinherited or unprovided for. 1 *Atk.* 387. 3 *Bro.* 229. 1 *Cox's P. Wms.* 60. If both freehold and copyhold eftates are devifed for the payment of debts, the chancellor will not fupply the defect of the furrender of the copyhold, unlefs the freehold is infufficient. 1 *Bro.* 273. 2 *Bro.* 325.

Equity will not affift a brother, grand-children, or a natural child. 3 *Atk.* 189. 2 *Vef.* 582.

 tenant;

tenant; and he ſhall receive the profits of the land to his own uſe, and ſhall diſcharge all ſervices due to the lord. Yet the intereſt remains in him not abſolutely, but *ſub modo*; for he cannot paſs away the land to any other, or make it ſubject to any other incumbrance than it was ſubject to at the time of the ſurrender. But no manner of legal intereſt is veſted in the nominee before admittance. If he enters, he is a treſpaſſer, and puniſhable in an action of treſpaſs (2): and if he ſurrenders to the uſe of another, ſuch ſurrender is merely void, and by no matter *ex poſt facto* can be confirmed. For though he be admitted in purſuance of the original ſurrender, and thereby acquires afterwards a ſufficient and plenary intereſt as abſolute owner, yet his ſecond ſurrender previous to his own admittance is abſolutely void *ab initio*; becauſe at the time of ſuch ſurrender he had but a poſſibility of an intereſt, and could therefore transfer nothing: and no ſubſequent admittance can make an act good, which was *ab initio* void. Yet, though upon the original ſurrender the nominee hath but a poſſibility, it is however ſuch a poſſibility, as may whenever he pleaſes be reduced to a certainty: for he cannot either by force or fraud be deprived or deluded of the effect and fruits of the ſurrender; but if the lord refuſe to admit him, he is compellable to do it by a bill in chancery, or a *mandamus*[k]: and the ſurrenderor
[369] can in no wiſe defeat his grant; his hands being for ever bound from diſpoſing of the land in any other way, and his mouth for ever ſtopped from revoking or countermanding his own deliberate act[l].

[k] 2 Roll. Rep. 107. [l] Co. Copyh. § 39.

(2) The ſurrenderee would not now be conſidered a treſpaſſer; for it has been determined that he may recover in an ejectment againſt the ſurrenderor, upon a demiſe laid after the ſurrender, where there was an admittance of the nominee before trial: but as the ſurrenderor after the ſurrender is conſidered merely a truſtee for the nominee, it ſhould ſeem that the deciſion would have been the ſame even if the ſubſequent admittance had not been proved. 1 *T. R.* 600.

2. As to the *prefentment*: that, by the *general* cuftom of manors, is to be made at the next court baron immediately after the furrender; but by *fpecial* cuftom in fome places it will be good, though made at the fecond or other fubfequent court. And it is to be brought into court by the *fame* perfons that took the furrender, and then to be prefented by the homage; and in all points material muft correfpond with the true tenor of the furrender itfelf. And therefore, if the furrender be conditional, and the prefentment be abfolute, both the furrender, prefentment, and admittance thereupon, are wholly void [m]: the furrender, as being never truly prefented; the prefentment, as being falfe; and the admittance, as being founded on fuch untrue prefentment. If a man furrenders out of court, and dies before prefentment, and prefentment be made after his death, according to the cuftom, this is fufficient [n]. So too, if *ceftuy que ufe* dies before prefentment, yet, upon prefentment made after his death, his heir according to the cuftom fhall be admitted. The fame law is, if thofe, into whofe hands the furrender is made, die before prefentment; for, upon fufficient proof in court that fuch a furrender was made, the lord fhall be compelled to admit accordingly. And if the fteward, the tenants, or others into whofe hands fuch furrender is made, refufe or neglect to bring it in to be prefented, upon a petition preferred to the lord in his court baron, the party grieved fhall find remedy. But if the lord will not do him right and juftice, he may fue both the lord, and them that took the furrender, in chancery, and fhall there find relief [o].

3. ADMITTANCE is the laft ftage, or perfection, of copyhold affurances. And this is of three forts: firft, an admittance upon a voluntary grant from the lord; fecondly, an admittance upon furrender by the former tenant; and, thirdly, an admittance upon a defcent from the anceftor. [370]

IN admittances, even upon a *voluntary grant* from the lord, when copyhold lands have efcheated or reverted to him, the lord

[m] Co. Copyh. 40.
[n] Co. Litt. 62.
[o] Co. Copyh. § 40.

is

is conſidered as an inſtrument. For, though it is in his power to keep the lands in his own hands, or to diſpoſe of them at his pleaſure, by granting an abſolute fee-ſimple, a freehold, or a chattel intereſt therein; and quite to change their nature from copyhold to ſocage tenure, ſo that he may well be reputed their abſolute owner and lord; yet if he will ſtill continue to diſpoſe of them as copyhold, he is bound to obſerve the antient cuſtom preciſely in every point, and can neither in tenure nor eſtate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this reſpect the law accounts him cuſtom's inſtrument. For if a copyhold for life falls into the lord's hands, by the tenant's death, though the lord may deſtroy the tenure and enfranchiſe the land, yet if he grants it out again by copy, he can neither add to nor diminiſh the antient rent, nor make any the minuteſt variation in other reſpects [p]; nor is the tenant's eſtate, ſo granted, ſubject to any charges or incumbrances by the lord [q].

IN admittances upon *ſurrender* of another, the lord is to no intent reputed as owner, but wholly as an inſtrument: and the tenant admitted ſhall likewiſe be ſubject to no charges or incumbrances of the lord; for his claim to the eſtate is ſolely under him that made the ſurrender [r].

[371] AND, as in admittances upon ſurrenders, ſo in admittances *upon deſcents* by the death of the anceſtor, the lord is uſed as a mere inſtrument; and, as no manner of intereſt paſſes into him by the ſurrender or the death of his tenant, ſo no intereſt paſſes out of him by the act of admittance. And therefore neither in the one caſe, nor the other, is any reſpect had to the quantity or quality of the lord's eſtate in the manor. For whether he be tenant in fee or for years, whether he be in poſſeſſion by right or by wrong, it is not material; ſince the admittances made by him ſhall not be impeached on account of his title, becauſe they are judicial, or rather miniſterial, acts, which every lord in poſſeſſion is bound to perform [s].

p Co. Copyh. § 41.
q 8 Rep. 63.
r 4 Rep. 27. Co. Litt. 59.
s 4 Rep. 27. 1 Rep. 140.

ADMITTANCES,

ADMITTANCES, however, upon ſurrender differ from admittances upon deſcent in this; that by ſurrender nothing is veſted in *ceſtuy que uſe*, before admittance, no more than in voluntary admittances; but upon deſcent the heir is tenant by copy immediately upon the death of his anceſtor: not indeed to all intents and purpoſes, for he cannot be ſworn on the homage nor maintain an action in the lord's court as tenant; but to moſt intents the law taketh notice of him as of a perfect tenant of the land inſtantly upon the death of his anceſtor, eſpecially where he is concerned with any ſtranger. He may enter into the land before admittance; may take the profits; may puniſh any treſpaſs done upon the ground[t]; nay, upon ſatisfying the lord for his fine due upon the deſcent, may ſurrender into the hands of the lord to whatever uſe he pleaſes(3). For which reaſons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to intitle him to his fine, and not ſo much neceſſary for the ſtrengthening and compleating the heir's title. Hence indeed an obſervation might ariſe, that if the benefit, which the heir is to receive by the admittance, is not equal to the charges of the fine, he will never come in and be admitted to his copyhold in court; and ſo the lord may be defrauded of his fine. But to this we may reply in [372] the words of ſir Edward Coke[u], "I aſſure myſelf, if it "were in the election of the heir to be admitted or not "to be admitted, he would be beſt contented without "admittance; but the cuſtom in every manor is in this "point compulſory. For, either upon pain of forfeiture "of their copyhold, or of incurring ſome great penalty, "the heirs of copyholders are inforced, in every manor, to "come into court and be admitted according to the cuſ-

[t] 4 Rep. 23. [u] Copyh. § 41.

(3) The heir having as complete a title without admittance as with it, againſt all the world but the lord, the court of king's bench will not grant a mandamus to compel the lord to admit him. 2 *T. R.* 197.

"tom,

" tom, within a ſhort time after notice given of their an-
" ceſtor's deceaſe (4)."

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(4) Copyholds are not within the ſtatute *de donis*, and cannot be intailed without a ſpecial cuſtom within the manor; and where ſuch a cuſtom exiſts, there may alſo be a cuſtom to bar the eſtate-tail, by a recovery ſuffered in the lord's court; but if no ſuch cuſtom appears of barring by recovery, the intail may be barred by ſurrender, or otherwiſe it would amount to a perpetuity. 2 *Veſ.* 601. Yet in ſome manors the cuſtom of barring by one mode, is coexiſtent with the cuſtom of barring by the other. 2 *Bl. Rep.* 944.

CHAPTER THE TWENTY-THIRD.

OF ALIENATION BY DEVISE.

THE laſt method of conveying real property, is, by *deviſe*, or diſpoſition contained in a man's laſt will and teſtament. And, in conſidering this ſubject, I ſhall not at preſent inquire into the nature of wills and teſtaments, which are more properly the inſtruments to convey perſonal eſtates; but only into the original and antiquity of deviſing real eſtates by will, and the conſtruction of the ſeveral ſtatutes upon which that power is now founded.

IT ſeems ſufficiently clear, that before the conqueſt, lands were deviſable by will [a]. But, upon the introduction of the military tenures, the reſtraint of deviſing lands naturally took place, as a branch of the feodal doctrine of non-alienation without the conſent of the lord [b]. And ſome have queſtioned, whether this reſtraint (which we may trace even from the antient Germans [c]) was not founded upon truer principles of policy, than the power of wantonly diſinheriting the heir by will, and transferring the eſtate, through the dotage or caprice of the anceſtor, from thoſe of his blood to utter ſtrangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours; ſince it rarely happens,

a Wright of tenures. 172.

b See page 57.

c *Tacit. de mor. Germ. c.* 21.

that

that the ſame man is heir to many others, though by art and management he may frequently become their deviſee. Thus the antient law of the Athenians directed that the eſtate of the deceaſed ſhould always deſcend to his children; or, on failure of lineal deſcendants, ſhould go to the collateral relations: which had an admirable effect in keeping up equality and preventing the accumulation of eſtates. But when Solon [d] made a ſlight alteration, by permitting them (though only on failure of iſſue) to diſpoſe of their lands by teſtament, and deviſe away eſtates from the collateral heir, this ſoon produced an exceſs of wealth in ſome, and of poverty in others: which, by a natural progreſſion, firſt produced popular tumults and diſſenſions; and theſe at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total ſubverſion of their ſtate and nation. On the other hand, it would now ſeem hard, on account of ſome abuſes, (which are the natural conſequence of free agency, when coupled with human infirmity) to debar the owner of lands from diſtributing them after his death, as the exigence of his family affairs, or the juſtice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which reſulted from Solon's inſtitution, the too great accumulation of property: which is the natural conſequence of our doctrine of ſucceſſion by primogeniture, to which the Athenians were ſtrangers. Of this accumulation the ill effects were ſeverely felt even in the feodal times: but it ſhould always be ſtrongly diſcouraged in a commercial country, whoſe welfare depends on the number of moderate fortunes engaged in the extenſion of trade.

HOWEVER this be, we find that, by the common law of England ſince the conqueſt, no eſtate, greater than for term of years, could be diſpoſed of by teſtament [e]; except only in Kent, and in ſome antient burghs, and a few particular manors, where their Saxon immunities by ſpecial indulgence

d Plutarch. *in vita Solon.*

e 2 Inſt. 7.

ſubſiſted.

ſubſiſted[f]. And though the feodal reſtraint on alienations by deed vaniſhed very early, yet this on wills continued for ſome centuries after; from an apprehenſion of infirmity and impoſition on the teſtator *in extremis*, which made ſuch deviſes ſuſpicious[g]. Beſides, in deviſes there was wanting that general notoriety, and public deſignation of the ſucceſſor, which in deſcents is apparent to the neighbourhood, and which the ſimplicity of the common law always required in every transfer and new acquiſition of property.

BUT when eccleſiaſtical ingenuity had invented the doctrine of uſes as a thing diſtinct from the land, uſes began to be deviſed very frequently[h], and the deviſee of the uſe could in chancery compel it's execution. For it is obſerved by Gilbert[j], that, as the popiſh clergy then generally ſate in the court of chancery, they conſidered that men are moſt liberal when they can enjoy their poſſeſſions no longer: and therefore at their death would chooſe to diſpoſe of them to thoſe, who, according to the ſuperſtition of the times, could intercede for their happineſs in another world. But, when the ſtatute of uſes[i] had annexed the poſſeſſion to the uſe, theſe uſes, being now the very land itſelf, became no longer deviſable: which might have occaſioned a great revolution in the law of deviſes, had not the ſtatute of wills been made about five years after, *viz.* 32 Hen. VIII. c. 1. explained by 34 Hen. VIII. c. 5. which enacted, that all perſons being ſeiſed in fee-ſimple (except feme-coverts (1), infants, ideots

f Litt. § 167. 1 Inſt. 111.
g Glanv. *l.* 7. *c.* 1.
h Plowd. 414.
j on deviſes. 7.
i 27 Hen. VIII. c. 10. See Dyer. 143.

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(1) Where lands are conveyed to truſtees, a married woman may have the power of appointing the diſpoſition of them after her death, which appointment muſt be executed like the will of a *feme ſole*, and will be ſubject to the ſame rules of conſtruction. 2 *Veſ.* 610. 1 *Bro.* 99. And though the contrary has been held, yet it has been determined by the houſe of lords, that the appointment of a married woman is effectual againſt the heir at law; though it depends

and perſons of nonſane memory) might by will and teſtament in writing deviſe to any other *perſon*, except to bodies corporate, two-thirds of their lands, tenements and hereditaments, held in chivalry, and the whole of thoſe held in ſocage: which now, through the alteration of tenures by the ſtatute of Charles the ſecond, amounts to the whole of their landed property, except their copyhold tenements.

CORPORATIONS were excepted in theſe ſtatutes, to prevent the extenſion of gifts in mortmain; but now, by conſtruction
[376] of the ſtatute 43 Eliz. c. 4. it is held, that a deviſe to a corporation for a charitable uſe is valid, as operating in the nature of an *appointment*, rather than of a *bequeſt*. And indeed the piety of the judges hath formerly carried them great lengths in ſupporting ſuch charitable uſes [k]; it being held that the ſtatute of Elizabeth, which favours appointments to charities, ſuperſedes and repeals all former ſtatutes[l], and ſupplies all defects of aſſurances [m]: and therefore not only a deviſe to a corporation, but a deviſe by a copyhold tenant without ſurrendering to the uſe of his will[n], and a deviſe (nay even a ſettlement) by tenant in tail without either fine or recovery, if made to a charitable uſe, are good by way of appointment [o].

WITH regard to deviſes in general, experience ſoon ſhewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are ſo nicely conſtructed and ſo artificially connected together, that the leaſt breach in any one of them diſorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance: for ſo looſe was the conſtruction made

k Ch. Prec. 272.
l Gilb. Rep. 45. 1 P. Wms. 248.
m Duke's charit. uſes. 84.
n Moor. 890.
o 2 Vern. 453. Ch. Prec. 16.

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pends only upon an agreement of her huſband before marriage, without any conveyance of the eſtate to truſtees. 6 *Bro. P. C.* 156.

upon

upon this act by the courts of law, that bare notes in the hand-writing of another perſon were allowed to be good wills within the ſtatute [p]. To remedy which, the ſtatute of frauds and perjuries, 29 Car. II. c 3. directs, that all deviſes of lands and tenements ſhall not only be in writing, but ſigned by the teſtator, or ſome other perſon in his preſence, and by his expreſs direction; and be ſubſcribed, in his preſence, by three or four credible witneſſes (2). And a ſolemnity nearly ſimilar is requiſite for revoking a deviſe by writing; though the ſame may be alſo revoked by burning, cancelling, tearing, or obliterating thereof by the deviſor, or in his preſence and with his conſent(3): as likewiſe *impliedly*, by ſuch a great and intire alteration in the circumſtances and ſituation of the deviſor, as ariſes from marriage and the birth of a child [q] (4).

In the conſtruction of this laſt ſtatute, it has been adjudged that the teſtator's name, written with his own hand, at the beginning of his will, as, "I John Mills do make this my

p Dyer. 72. Cro. Eliz. 100.

q Chriſtopher v. Chriſtopher. *Scacch.* 6 Jul. 1771. Spragge v. Stone, at the Cockpit, 27 Mar. 1773. by Wilmot, de Grey, and Parker. See page 502.

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(2) Copyholds and terms for years are not within the ſtatute, but will paſs by any will which is ſufficient to bequeath perſonalty. 2 *Atk.* 37. 2 *Bro.* 58.

(3) It has been determined, that one will cannot be revoked by another will, though it ſhould contain a clauſe declaring all former wills to be revoked, unleſs the ſecond is valid and effectual as a will. 2 *P. Wms.* 343. Yet a will may be revoked by an inſtrument written merely for the purpoſe of revocation; but it muſt be atteſted by three witneſſes, and the teſtator muſt ſign it in *their preſence*, which is not neceſſary in the execution of a will. The reaſon of this difference, if it was deſigned, is not obvious. 29 *Car.* 2. *c.* 3. *ſ.* 6.

(4) Marriage and the birth of a poſthumous child amount to a revocation. 5 *T. R.* 49.

 "laſt

"last will and testament," is a sufficient signing, without any name at the bottom[q]; though the other is the safer way (5). It has also been determined, that though the witnesses must all see the testator sign, or at least acknowlege the signing, yet they may do it at different times[r]. But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument[s] (6). And, in one case determined by the court of king's-bench[t], the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination however alarmed many purchasors and creditors, and threatened

q 3 Lev. 1.

r Freem. 486. 2 Ch. Cas. 109. Pr. Ch. 185.

s 1 P. Wms. 740.

t Stra. 1253.

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(5) I conceive that writing the name at the beginning would never be considered a signing according to the statute, unless the whole will was written by the testator himself; for whatever is written by a stranger after the name of the testator, affords no evidence of the testator's assent to it, if the subscription of his name in his own hand is not subjoined.

(6) It has been determined to be in his presence, if he is apprized at the time of the attestation of the witnesses, and was in a situation from which he might have seen the witnesses subscribe their names. As in a case where the testator's carriage was drawn opposite the windows of an attorney's office, in which the witnesses attested the will, this was clearly determined to be in the testator's presence. 1 *Bro.* 99. The object of this requisition in the statute is to prevent the testator and the witnesses from being imposed upon by the substitution of another instrument or a fabricated will. Hence the attestation of a will is void, if at the time the testator is in a state of insensibility. *Doug.* 229.

to

to ſhake moſt of the titles in the kingdom, that depended on deviſes by will. For, if the will was atteſted by a ſervant to whom wages were due, by the apothecary or attorney whoſe very attendance made them creditors, or by the miniſter of the pariſh who had any demand for tithes or eccleſiaſtical dues, (and theſe are the perſons moſt likely to be preſent in the teſtator's laſt illneſs) and if in ſuch caſe the teſtator had charged his real eſtate with the payment of his debts, the whole will, and every diſpoſition therein, ſo far as related to real property, were held to be utterly void. This occaſioned the ſtatute 25 Geo. II. c. 6. which reſtored both the competency and the credit of ſuch *legatees*, by declaring void all legacies (7) given to witneſſes, and thereby removing all poſſibility of their intereſt affecting their teſtimony. The ſame ſtatute likewiſe eſtabliſhed the competency of *creditors*, by directing the teſtimony of all ſuch creditors to be admitted, but leaving their credit (like that of all other witneſſes) to be conſidered, on a view of all the circumſtances, by the court and jury before whom ſuch will ſhall be conteſted. And in a [378] much later caſe [u] the teſtimony of three witneſſes who were creditors, was held to be ſufficiently credible, though the land was charged with the payment of debts; and the reaſons given on the former determination were ſaid to be inſufficient (8).

ANOTHER inconvenience was found to attend this new method of conveyance by deviſe; in that creditors by bond and other ſpecialties, which affected the *heir* provided he had

u M. 31 Geo. II. 4 Bur. I. 430.

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(7) This extends to deviſes, and every intereſt given to the witneſſes.

(8) The ſubſcribing witneſſes may afterwards be admitted to prove the teſtator was inſane when he executed his will. But in a caſe where the three witneſſes and twelve ſervants ſwore to the teſtator's inſanity, they were contradicted by the whole neighbourhood, and the ſubſcribing witneſſes were afterwards convicted of perjury. Lowe *v.* Jolliffe, 1 *Bl. Rep.* 365.

aſſets by deſcent, were now defrauded of their ſecurities, not having the ſame remedy againſt the *deviſee* of their debtor. To obviate which, the ſtatute 3 & 4 W. & M. c. 14. hath provided, that all wills, and teſtaments, limitations, diſpoſitions, and appointments of real eſtates, by tenants in fee-ſimple or having power to diſpoſe by will, ſhall (as againſt ſuch creditors only) be deemed to be fraudulent and void: and that ſuch creditors may maintain their actions jointly againſt both the heir and the deviſee (9).

A WILL of lands, made by the permiſſion and under the control of theſe ſtatutes, is conſidered by the courts of law not ſo much in the nature of a teſtament, as of a conveyance declaring the uſes to which the land ſhall be ſubject: with this difference, that in other conveyances the actual *ſubſcription* of the witneſſes is not required by law [w], though it is prudent for them ſo to do, in order to aſſiſt their memory when living, and to ſupply their evidence when dead; but in deviſes of lands ſuch ſubſcription is now abſolutely neceſſary by ſtatute, in order to identify a conveyance, which in it's nature can never be ſet up till after the death of the deviſor. And upon this notion, that a deviſe affecting lands is merely a ſpecies of conveyance, is founded this diſtinction between ſuch deviſes and teſtaments of perſonal chattels; that the latter will operate upon whatever the teſtator dies poſſeſſed of, the former only upon ſuch real eſtates as were his at the time of executing and publiſhing his will[x] (10). Wherefore no after-

w See pag. 307, 308.

x 1 P. Wms. 575. 11 Mod. 148.

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(9) A deviſe to raiſe a portion for younger children according to an agreement before marriage, and a deviſe for the payment of debts, are exceptions in the ſtatute. *ſect.* 4. But it has been held, that the payment of the debt muſt be provided for effectually in order to bring it within the exception. 1 *Bro.* 311. 2 *Bro.* 614.

(10) Lord Mansfield has declared, that this does not turn upon the conſtruction of the ſtatute 32 Hen. VIII. c. 1. (as ſome have ſuppoſed,) which ſays, that any perſon *having* lands, &c. may deviſe; for the ſame rule held before the ſtatute, where lands were deviſable by cuſtom. *Cowp.* 90. It has been determined, that where a teſ-

tator

purchaſed lands will paſs under ſuch deviſe [y], unleſs, ſubſequent to the purchaſe or contract [z], the deviſor republiſhes his will [a] (11).

WE have now conſidered the ſeveral ſpecies of common aſſurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of juſtice, for the conſtruction and expoſition of them all. Theſe are,

y Moor. 255. 11 Mod. 127.
z 1 Ch. Caſ. 39. 2 Ch. Caſ. 144.
a Salk. 238.

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tator has deviſed all his lands, or all the lands which he ſhall have at the time of his death; if he purchaſes copyholds after the execution of the will, and ſurrenders them to the uſes *declared* by his will, they will paſs by the will. *Cowp.* 130. Or if the teſtator, after making ſuch a deviſe, purchaſes freehold lands, and then makes a codicil duly executed according to the ſtatute, though no notice is taken of the after-purchaſed lands; yet if the codicil is annexed to, or confirms the will, or as it ſeems has a reference to it, this amounts to a republication of the will, and the after-purchaſed lands will paſs under the general deviſe. *Cowp.* 158. *Com.* 383. 4 *Bro.* 2.

(11) If an eſtate is given to A and his heirs, or to A and the heir of his body, or any intereſt whatever to A, and A dies before the teſtator, the deviſe is lapſed and void, and the heir of A can claim no benefit from the deviſe. A ſevere inſtance of this rule occurred not long ago in Ireland. A father deviſed his eſtate to his eldeſt ſon and the heirs of his body, and upon failure of his iſſue to his ſecond ſon in like manner in tail; the eldeſt ſon died before the father, leaving ſeveral children; and the father, ſuppoſing that the eldeſt of them would take under the deviſe, made no alteration in his will; the conſequence was, that the deviſe was lapſed and void, and the ſecond ſon was entitled by the will to an eſtate-tail, in excluſion of the children of the eldeſt brother, the firſt objects of the father's bounty and regard.

The court of king's bench in Ireland decided in favour of the grandſon; but that deciſion was reverſed by the king's bench and houſe of lords here, the queſtion being too clear to admit a doubt. White *v.* White, 1 *Bro.* 219. *Doug.* 323.

 1. THAT

1. THAT the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law will admit[b]. For the maxims of law are, that "*verba intentioni debent inservire*;" and "*benigne interpretamur chartas propter simplicitatem laicorum.*" And therefore the construction must also be *reasonable*, and agreeable to common understanding[c].

2. THAT *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*[d]: but that, where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words*; *nam qui haeret in litera, haeret in cortice.* Therefore, by a grant of a remainder a reversion may well pass, and *e converso*[e]. And another maxim of law is, that "*mala grammatica non vitiat chartam*;" neither false English nor bad Latin will destroy a deed[f]. Which perhaps a classical critic may think to be no unnecessary caution.

3. THAT the construction be made upon the entire deed, and not merely upon disjointed parts of it. "*Nam ex antecedentibus et consequentibus fit optima interpretatio*[g]." And
[380] therefore that every part of it be (if possible) made to take effect; and no word but what may operate in some shape or other[h]. "*Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat*[i]."

4. THAT the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. "*Verba fortius accipiuntur contra proferentem.*" s, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee[j]. For the principle of self-preservation will make men sufficiently careful, not to prejudice their own interest by the too

b And. 60.
c 1 Bulstr. 175. Hob. 304.
d 2 Saund. 157.
e Hob. 27.
f 10 Rep. 133. Co. Litt. 223.
2 Show. 334.
g 1 Bulstr. 101.
h 1 P. Wms. 457.
i Plowd. 156.
j Co. Litt. 42.

extensive

extenſive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expreſſions, provided they were afterwards at liberty to put their own conſtruction upon them. But here a diſtinction muſt be taken between an indenture and a deed-poll: for the words of an indenture, executed by both parties, are to be conſidered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, becauſe the other party hath given his conſent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and ſhall be taken moſt ſtrongly againſt him [k]. And, in general, this rule, being a rule of ſome ſtrictneſs and rigour, is the laſt to be reſorted to; and is never to be relied upon, but where all other rules of expoſition fail [l].

5. THAT, if the words will bear two ſenſes, one agreeable to, and another againſt law; that ſenſe be preferred, which is moſt agreeable thereto [m]. As if tenant in tail lets a leaſe to have and to hold during life generally, it ſhall be conſtrued to be a leaſe for his own life only, for that ſtands with the law; and not for the life of the leſſee, which is beyond his power to grant.

6. THAT, in a deed, if there be two clauſes ſo totally repugnant to each other, that they cannot ſtand together, the firſt ſhall be received and the latter rejected [n]: wherein it differs from a will; for there, of two ſuch repugnant clauſes the latter ſhall ſtand [o]. Which is owing to the different natures of the two inſtruments; for the firſt deed, and the laſt will are always moſt available in law (12). Yet in both caſes we ſhould rather attempt to reconcile them [p]. [381]

k Co. Litt. 134.
l Bacon's Elem. c. 3.
m Co. Litt. 42.
n Hardr. 94.
o Co. Litt. 112.
p Cro. Eliz. 420. 1 Vern. 30.

(12) Such was held to be the law in the time of lord Coke; but now where the ſame eſtate is given by the teſtator to two perſons in

 different

7. THAT a devise be most favourably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance[q]; and an estate-tail without words of procreation[r] (13). By a will also an estate may pass by mere implication,

[q] See pag. 108. [r] See pag. 115.

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different parts of his will, they are construed to take the estate as joint-tenants, or tenants in common, according to the limitations of the estates and interests devised. 3 *Atk.* 493. *Harg. Co. Litt.* 112. *b.*

(13) In the celebrated case of Perrin *v.* Blake, the question was this, *viz.* whether the manifest intention of the testator to give to the first taker an estate for life only ought to prevail, or that he should have an estate-tail from the construction, which would have clearly been put upon the same words, if they had been used in a deed. The devise in substance was as follows; the testator declared, it is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his own life; and *to that intent* I give my son John Williams my estate during his natural life, remainder to my brother-in-law during the life of my son John Williams (the design of that being to support the contingent remainder); remainder to the heirs of the body of John Williams. Lord Mansfield and two other judges of the court of king's bench determined, that John Williams took an estate for life only; but upon a writ of error to the exchequer chamber, the decision was reversed, and six out of eight of the other judges held, that John Williams took an estate-tail, which of consequence gave him an absolute power of *selling or disposing of* the estate as he pleased. The discussion of this subject called forth a splendid display of legal learning and ingenuity. Yet it has since been observed by a learned judge, that as one of the judges held that John Williams took an estate-tail, because he was of opinion that such might be presumed to be the testator's intention, no argument in future can be drawn from this case; because one half of the judges relied upon the ground of intention alone.

And

without any expreſs words to direct it's courſe. As, where a man deviſes lands to his heir at law, after the death of his wife; here, though no eſtate is given to the wife in expreſs terms, yet ſhe ſhall have an eſtate for life by implication [s]; for the intent of the teſtator is clearly to poſtpone the heir till after her death; and, if ſhe does not take it, nobody elſe can (14). So alſo, where a deviſe is of black-acre to A and of white-acre to B in tail, and if they both die without iſſue, then to

[s] H. 13 Hen. VII. 17. 1 Ventr. 376.

And the Editor entirely concurs with that learned judge, that it is the firſt and great rule in the expoſition of wills, and to which all other rules muſt bend, that the intention of the teſtator expreſſed in his will ſhall prevail, provided it be *conſiſtent with the rules of law*; that is, provided it can be effectuated conſiſtently with the limits and bounds which the law preſcribes. Mr. J. Buller, *Doug.* 322. To argue that the intention ſhall be fruſtrated by a *rule of conſtruction of certain words*, is to ſay that the intention ſhall be defeated by the uſe of the very words which the teſtator has adopted as the beſt to communicate his intention, and of which the ſenſe is intelligible to all mankind.

Where technical phraſes and terms of art are uſed alone by a teſtator, it is fair to preſume that he knew their artificial import and ſignification, and that ſuch was his will and intention; but where he happens to introduce them, and at the ſame time in effect declares, that I do not intend what conveyancers underſtand by theſe words, but my intention is to diſpoſe of my eſtate directly contrary to the conſtruction generally put upon them; ſurely courts of juſtice are, or ought to be, as much at liberty, or rather under an obligation, to effectuate that intention as far as the law will admit, as if he had expreſſed it in the moſt apt and appropriate language. 1 *Bl. Rep.* 672. 4 *Burr.* 2579. *Doug.* 329. *Fearne*, 113. *Harg. Tracts*, 351. 490.

(14) But it has been thought, that, if it is given to a ſtranger after the wife's death, the deviſe raiſes no implication in favour of the wife, for it may deſcend to the heir during the life of the wife, which poſſibly may have been the teſtator's intention. *Cro. Jac.* 75.

C in fee; here A and B have *crofs remainders* by implication, and on the failure of either's iffue, the other or his iffue fhall take the whole; and C's remainder over fhall be poftponed till the iffue of both fhall fail [t]. But, to avoid confufion, no fuch crofs remainders are allowed between more than two devifees [u] (15): and, in general, where any implications are allowed, they muft be fuch as are *neceffary* (or at leaft highly
[382] *probable*) and not merely *poffible* implications [w]. And herein there is no diftinction between the rules of law and of equity; for the will, being confidered in both courts in the light of a limitation of ufes [x], is conftrued in each with equal favour and benignity, and expounded rather on it's own particular circumftances, than by any general rules of pofitive law.

AND thus we have taken a tranfient view, in this and the three preceding chapters, of a very large and diffufive fubject, the doctrine of common affurances: which concludes our obfervations on the *title* to things real, or the means by which they may be reciprocally loft and acquired. We have before confidered the *eftates* which may be had in them, with regard to their duration or quantity of intereft, the time of their enjoyment, and the number and connections of the per-

[t] Freem. 484.
[u] Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.
[w] Vaugh. 262.
[x] Fitz. 236. 11 Mod. 153.

(15) The contrary has for fome time been fully eftablifhed; and this has been laid down by lord Mansfield as a general rule; *viz.* wherever crofs remainders are to be raifed between two and no more, the favourable prefumption is in fupport of crofs remainders: where between more than two, the prefumption is againft them; but the intention of the teftator may defeat the prefumption in either cafe.

And the Editor conceives that crofs remainders would be raifed in every cafe, in which it appears to be the teftator's intention that the fubfequent devifee fhall take nothing till the iffue of all the firft devifees are extinct. *Cowp.* 777. 797. 4 *T. R.* 710.

fons

ſons entitled to hold them: we have examined the *tenures*, both antient and modern, whereby thoſe eſtates have been, and are now, holden: and have diſtinguiſhed the object of all theſe inquiries, namely, things real, into the corporeal or ſubſtantial, and incorporeal or ideal *kind*; and have thus conſidered the rights of real property in every light wherein they are contemplated by the laws of England. A ſyſtem of laws, that differs much from every other ſyſtem, except thoſe of the ſame feodal origin, in it's notions and regulations of landed eſtates; and which therefore could in this particular be very ſeldom compared with any other.

THE ſubject, which has thus employed our attention, is of very extenſive uſe, and of as extenſive variety. And yet, I am afraid, it has afforded the ſtudent leſs amuſement and pleaſure in the purſuit, than the matters diſcuſſed in the preceding volume. To ſay the truth, the vaſt alterations which the doctrine of real property has undergone from the conqueſt to the preſent time; the infinite determinations upon points that continually ariſe, and which have been heaped one upon another for a courſe of ſeven centuries, without any order or method; and the multiplicity of acts of parliament which [383] have amended, or ſometimes only altered, the common law; theſe cauſes have made the ſtudy of this branch of our national juriſprudence a little perplexed and intricate. It hath been my endeavour principally to ſelect ſuch parts of it, as were of the moſt general uſe, where the principles were the moſt ſimple, the reaſons of them the moſt obvious, and the practice the leaſt embarraſſed. Yet I cannot preſume that I have always been thoroughly intelligible to ſuch of my readers, as were before ſtrangers even to the very terms of art, which I have been obliged to make uſe of: though, whenever thoſe have firſt occurred, I have generally attempted a ſhort explication of their meaning. Theſe are indeed the more numerous, on account of the different languages, which our law has at different periods been taught to ſpeak; the difficulty ariſing from which will inſenſibly diminiſh by uſe and familiar

familiar acquaintance. And therefore I ſhall cloſe this branch of our inquiries with the words of ſir Edward Coke [y]: "albeit the ſtudent ſhall not at any one day, do what he can, "reach to the full meaning of all that is here laid down, yet "let him no way diſcourage himſelf but proceed; for on ſome "other day, in ſome other place," (or perhaps upon a ſecond peruſal of the ſame) "his doubts will be probably removed."

y Proeme to 1 Inſt.

CHAPTER THE TWENTY-FOURTH.

OF THINGS PERSONAL.

UNDER the name of things *perſonal* are included all ſorts of things *moveable*, which may attend a man's perſon wherever he goes; and therefore, being only the objects of the law while they remain within the limits of it's juriſdiction, and being alſo of a periſhable quality, are not eſteemed of ſo high a nature, nor paid ſo much regard to by the law, as things that are in their nature more permanent and *immoveable*, as lands, and houſes, and the profits iſſuing thereout. Theſe being conſtantly within the reach, and under the protection of the law, were the principal favourites of our firſt legiſlators: who took all imaginable care in aſcertaining the rights, and directing the diſpoſition, of ſuch property as they imagined to be laſting, and which would anſwer to poſterity the trouble and pains that their anceſtors employed about them: but at the ſame time entertained a very low and contemptuous opinion of all perſonal eſtate, which they regarded as only a tranſient commodity. The amount of it indeed was comparatively very trifling, during the ſcarcity of money and the ignorance of luxurious refinements, which prevailed in the feodal ages. Hence it was, that a tax of the *fifteenth*, *tenth*, or ſometimes a much larger proportion, of all the moveables of the ſubject, was frequently laid without ſcruple, and is mentioned with much unconcern by our antient hiſtorians, though now it would juſtly alarm our opulent merchants and ſtockholders. And hence likewiſe may be derived the frequent forfeitures inflicted by the common law,

law, of *all* a man's goods and chattels, for miſbehaviours and inadvertencies that at preſent hardly ſeem to deſerve ſo ſevere a puniſhment. Our antient law-books, which are founded upon the feodal proviſions, do not therefore often condeſcend to regulate this ſpecies of property. There is not a chapter in Britton or the mirroir, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, ſeems principally borrowed from the civilians. But of later years, ſince the introduction and extenſion of trade and commerce, which are entirely occupied in this ſpecies of property, and have greatly augmented it's quantity and of courſe it's value, we have learned to conceive different ideas of it. Our courts now regard a man's perſonalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and leſs technical mode of conſidering the one than the other; frequently drawn from the rules which they found already eſtabliſhed by the Roman law, wherever thoſe rules appeared to be well-grounded and appoſite to the caſe in queſtion, but principally from reaſon and convenience, adapted to the circumſtances of the times; preſerving withal a due regard to antient uſages, and a certain feodal tincture, which is ſtill to be found in ſome branches of perſonal property.

BUT things perſonal, by our law, do not only include things *moveable*, but alſo ſomething more: the whole of which is comprehended under the general name of *chattels*, which, ſir Edward Coke ſays [a], is a French word ſignifying goods. The appellation is in truth derived from the technical Latin word, *catalla;* which primarily ſignified only beaſts of huſbandry, or (as we ſtill call them) *cattle*, but in it's ſecondary ſenſe was applied to all moveables in general [b]. In the *grand couſtumier* of Normandy [c] a *chattel* is deſcribed as a mere moveable, but at the ſame time it is ſet in oppoſition to a fief or feud: ſo that not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more extended, negative ſenſe, that our law adopts it; the idea of

a 1 Inſt. 118.

b Dufreſne. II. 409.

c c. 87.

goods,

goods, or moveables only, being not fufficiently comprehenfive to take in every thing that the law confiders as a chattel intereft. For fince, as the commentator on the *couftumier*[d] obferves, there are two requifites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of thefe qualities is not, according to the Normans, an heritage or fief; or, according to us, is not a *real* eftate: the confequence of which in both laws is, that it muft be a perfonal eftate, or chattel.

CHATTELS therefore are diftributed by the law into two kinds; chattels *real*, and chattels *perfonal*[e].

1. CHATTELS *real*, faith fir Edward Coke[f], are fuch as concern, or favour of, the realty; as terms for years of land, wardfhips in chivalry, (while the military tenures fubfifted) the next prefentation to a church, eftates by a ftatute-merchant, ftatute-ftaple, *elegit*, or the like; of all which we have already fpoken. And thefe are called real chattels, as being interefts iffuing out of, or annexed to real eftates: of which they have one quality, *viz.* immobility, which denominates them *real;* but want the other, *viz.* a fufficient, legal indeterminate duration: and this want it is, that conftitutes them *chattels.* The utmoft period for which they can laft is fixed and determinate, either for fuch a fpace of time certain, or till fuch a particular fum of money be raifed out of fuch a particular income; fo that they are not equal in the eye of the law to the loweft eftate of freehold, a leafe for another's life: their tenants were confidered upon feodal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have deftroyed their intereft, till the reign of Henry VIII[g]. A freehold, which alone is a real eftate, and feems (as has been faid) to anfwer to the fief in Normandy, is conveyed by corporal inveftiture and

[d] *Il convïendroit quil fuft non mouuable et de duree a toufiours. fol.* 107. *a.*

[e] So too, in the Norman law, *Cateux font meubles et immeubles: ficomme vrais meubles font qui tranfporter fe peuvent, et enfuivir le corps; immeubles font chofes qui ne peuvent enfuivir le corps, ni eftre tranfportees, et tout ce qui n'eft point en heritage. LL.* Will. Nothi, c. 4. *apud* Dufrefne. II. 409.

[f] 1 Inft. 118.

[g] See page 142.

livery

livery of ſeiſin; which gives the tenant ſo ſtrong a hold of the land, that it never after can be wreſted from him during his life, but by his own act, of voluntary transfer or of forfeiture; or elſe by the happening of ſome future contingency, as in eſtates *pur auter vie*, and the determinable freeholds mentioned in a former chapter [h]. And even theſe, being of an uncertain duration, may by poſſibility laſt for the owner's life; for the law will not preſuppoſe the contingency to happen before it actually does, and till then the eſtate is to all intents and purpoſes a life eſtate, and therefore a freehold intereſt. On the other hand, a chattel intereſt in lands, which the Normans put in oppoſition to fief, and we to freehold, is conveyed by no ſeiſin or corporal inveſtiture, but the poſſeſſion is gained by the mere entry of the tenant himſelf; and it will certainly expire at a time prefixed and determined, if not ſooner Thus a leaſe for years muſt neceſſarily fail at the end and completion of the term; the next preſentation to a church is ſatisfied and gone the inſtant it comes into poſſeſſion, that is, by the firſt avoidance and preſentation to the living; the conditional eſtates by ſtatutes and *elegit* are determined as ſoon as the debt is paid; and ſo guardianſhips in chivalry expired of courſe the moment that the heir came of age. And if there be any other chattel real, it will be found to correſpond with the reſt in this eſſential quality, that it's duration is limited to a time certain, beyond which it cannot ſubſiſt.

2. CHATTELS *perſonal* are, properly and ſtrictly ſpeaking, things *moveable*; which may be annexed to or attendant on the perſon of the owner, and carried about with him from one part of the world to another. Such are animals, houſehold-ſtuff, money, jewels, corn, garments, and every thing elſe that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to ſpeak in the remainder of this book; having been unavoidably led to conſider the nature of chattels real, and their incidents, in the former chapters which were

h page 120.

employed

employed upon real eſtates: that kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteriſtics of each ſpecies of things; the immobility of things real, and the precarious duration of things perſonal.

CHATTEL interefts being thus diſtinguiſhed and diſtributed, it will be proper to conſider, firſt, the nature of that *property*, or dominion, to which they are liable; which muſt be principally, nay ſolely, referred to perſonal chattels: and, ſecondly, the *title* to that property, or how it may be loſt and acquired. Of each of theſe in it's order.

CHAPTER THE TWENTY-FIFTH.

OF PROPERTY IN THINGS PERSONAL.

PROPERTY, in chattels perfonal, may be either in *poffeffion*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or elfe it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of thefe the former, or property in *poffeffion*, is divided into two forts, an *abfolute* and a *qualified* property.

I. FIRST then of property in *poffeffion abfolute*; which is where a man hath, folely and exclufively, the right, and alfo the occupation, of any moveable chattels; fo that they cannot be transferred from him, or ceafe to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: fuch alfo may be all *vegetable* productions, as the fruit or other parts of a plant, when fevered from the body of it; or the whole plant itfelf, when fevered from the ground; none of which can be moved out of the owner's poffeffion without his own act or confent, or at leaft without doing him an injury, which it is the bufinefs of the law to prevent or remedy. Of thefe therefore there remains little to be faid.

BUT with regard to *animals*, which have in themfelves a principle and power of motion, and (unlefs particularly confined) can convey themfelves from one part of the world to another,

another, there is a great difference made with reſpect to their ſeveral claſſes, not only in our law, but in the law of nature and of all civilized nations. They are diſtinguiſhed into ſuch as are *domitae*, and ſuch as are *ferae naturae:* ſome being of a *tame* and others of a *wild* diſpoſition. In ſuch as are of a nature tame and domeſtic, (as horſes, kine, ſheep, poultry, and the like) a man may have as abſolute a property as in any inanimate beings; becauſe theſe continue perpetually in his occupation, and will not ſtray from his houſe or perſon, unleſs by accident or fraudulent enticement, in either of which caſes the owner does not loſe his property [a]: in which our law agrees with the laws of France and Holland [b]. The ſtealing, or forcible abduction, of ſuch property as this, is alſo felony; for theſe are things of intrinſic value, ſerving for the food of man, or elſe for the uſes of huſbandry [c]. But in animals *ferae naturae* a man can have no abſolute property.

Of all tame and domeſtic animals, the brood belongs to the owner of the dam or mother; the Engliſh law agreeing with the civil, that "*partus ſequitur ventrem*" in the brute creation, though for the moſt part in the human ſpecies it diſallows that maxim. And therefore in the laws of England [d], as well as Rome [e], "*ſi equam meam equus tuus praegnantem fecerit, non eſt tuum ſed meum quod natum eſt.*" And, for this Puffendorf [f] gives a ſenſible reaſon: not only becauſe the male is frequently unknown; but alſo becauſe the dam, during the time of her pregnancy, is almoſt uſeleſs to the proprietor, and muſt be maintained with great expence and care: wherefore as her owner is the loſer by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the caſe of young cygnets; which belong equally to the owner of the cock and hen, and ſhall be divided between them [g]. But here the reaſons of the general rule ceaſe

[a] 2 Mod. 319.
[b] *Vinn. in Inſt. l.* 2. *tit.* 1. § 15.
[c] 1 Hal. P. C. 511, 512.
[d] Bro. *Abr. tit. propertie.* 29.
[e] *Ff.* 6. 1. 5.
[f] L. of N. l. 4. c. 7.
[g] 7 Rep. 17.

and "*ceſſante ratione ceſſat et ipſa lex*:" for the male is well known, by his conſtant aſſociation with the female; and for the ſame reaſon the owner of the one doth not ſuffer more diſadvantage, during the time of pregnancy and nurture, than the owner of the other.

II. OTHER animals, that are not of a tame and domeſtic nature, are either not the objects of property at all, or elſe fall under our other diviſion, namely, that of *qualified, limited*, or *ſpecial* property: which is ſuch as is not in it's nature permanent, but may ſometimes ſubſiſt, and at other times not ſubſiſt. In diſcuſſing which ſubject, I ſhall in the firſt place ſhew, how this ſpecies of property may ſubſiſt in ſuch animals as are *ferae naturae*, or of a wild nature; and then, how it may ſubſiſt in any other things, when under particular circumſtances.

FIRST then, a man may be inveſted with a qualified, but not an abſolute, property in all creatures that are *ferae naturae*, either *per induſtriam*, *propter impotentiam*, or *propter privilegium*.

1. A QUALIFIED property may ſubſiſt in animals *ferae naturae, per induſtriam hominis*: by a man's *reclaiming* and making them tame by art, induſtry, and education; or by ſo confining them within his own immediate power, that they cannot eſcape and uſe their natural liberty. And under this head ſome writers have ranked all the former ſpecies of animals we have mentioned, apprehending none to be originally and naturally tame, but only made ſo by art and cuſtom: as horſes, ſwine, and other cattle; which, if originally left to themſelves, would have choſen to rove up and down, ſeeking their food at large, and are only made domeſtic by uſe and familiarity; and are therefore, ſay they, called *manſueta, quaſi manui aſſueta*. But however well this notion may be founded, abſtractedly conſidered, our law apprehends the moſt obvious diſtinction to be, between ſuch animals as we generally ſee tame, and are therefore ſeldom,

if ever, found wandering at large, which it calls *domitae naturae*: and ſuch creatures as are uſually found at liberty, which are therefore ſuppoſed to be more emphatically *ferae naturae*, though it may happen that the latter ſhall be ſometimes tamed and confined by the art and induſtry of man. Such as are deer in a park, hares or rabbets in an incloſed warren, doves in a dovehouſe, pheaſants or partridges in a mew, hawks that are fed and commanded by their owner, and fiſh in a private pond or in trunks. Theſe are no longer the property of a man, than while they continue in his keeping or actual poſſeſſion: but if at any time they regain their natural liberty, his property inſtantly ceaſes; unleſs they have *animum revertendi*, which is only to be known by their uſual cuſtom of returning[h]. A maxim which is borrowed from the civil law[i]; "*revertendi animum videntur deſinere* "*habere tunc, cum revertendi conſuetudinem deſeruerint.*" The law therefore extends this poſſeſſion farther than the mere manual occupation; for my tame hawk that is purſuing his quarry in my preſence, though he is at liberty to go where he pleaſes, is nevertheleſs my property; for he hath *animum revertendi*. So are my pigeons, that are flying at a diſtance from their home, (eſpecially of the carrier kind) and likewiſe the deer that is chaſed out of my park or foreſt, and is inſtantly purſued by the keeper or foreſter: all which remain ſtill in my poſſeſſion, and I ſtill preſerve my qualified property in them. But if they ſtray without my knowlege, and do not return in the uſual manner, it is then lawful for any ſtranger to take them[k]. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleaſure; or if a wild ſwan is taken, and marked and turned looſe in the river, the owner's property in him ſtill continues, and it is not lawful for any one elſe to take him[l]: but otherwiſe, if the deer has been long abſent without returning, or the ſwan leaves the neighbourhood. Bees alſo are *ferae naturae*; but, when hived and reclaimed, a

h Bracton. *l.* 2. *c.* 1. 7 Rep. 17.

i *Inſt.* 2. 1. 15.

k Finch. L. 177.

l Crompt. of courts 167. 7 Rep. 16.

man may have a qualified property in them, by the law of nature, as well as by the civil law[m]. And to the ſame pur-
[393] poſe, not to ſay in the ſame words with the civil law, ſpeaks Bracton[n]: occupation, that is, hiving or including them, gives the property in bees; for, though a ſwarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their neſt thereon; and therefore if another hives them, he ſhall be their proprietor: but a ſwarm, which fly from and out of my hive, are mine ſo long as I can keep them in ſight, and have power to purſue them; and in theſe circumſtances no one elſe is entitled to take them. But it hath been alſo ſaid[o], that with us the only ownerſhip in bees is *ratione ſoli;* and the charter of the foreſt[p], which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in conſideration of the property of the ſoil whereon they are found.

IN all theſe creatures, reclaimed from the wildneſs of their nature, the property is not abſolute, but defeaſible: a property, that may be deſtroyed if they reſume their antient wildneſs, and are found at large. For if the pheaſants eſcape from the mew, or the fiſhes from the trunk, and are ſeen wandering at large in their proper element, they become *ferae naturae* again; and are free and open to the firſt occupant that has ability to ſeize them. But while they thus continue my qualified or defeaſible property, they are as much under the protection of the law, as if they were abſolutely and indefeaſibly mine; and an action will lie againſt any man that detains them from me, or unlawfully deſtroys them. It is alſo as much felony by common law to ſteal ſuch of them as are fit for food (1), as it is to ſteal tame animals[q]: but not ſo, if they

[m] Puff. *l.* 4. *c.* 6. § 5. *Inſt.* 2. 1. 14.
[n] *l.* 2. *c.* 1. § 3.
[o] Bro. *Abr. tit. propertie.* 37. cites 43 Edw. III. 24.
[p] 9 Hen. III. c. 13.
[q] 1 Hal. P. C. 512.

(1) But it is not felony to ſteal ſuch animals of a wild nature, unleſs they are ſo confined that the owner can take them whenever he

are only kept for pleaſure, curioſity, or whim, as dogs, bears, cats, apes, parrots, and ſinging birds [r]; becauſe their value is not intrinſic, but depending only on the caprice of the owner [s]: though it is ſuch an invaſion of property as may amount to a civil injury, and be redreſſed by a civil action [t]. [394]
Yet to ſteal a reclaimed hawk is felony both by common law and ſtatute [u]; which ſeems to be a relic of the tyranny of our antient ſportſmen. And, among our elder anceſtors the antient Britons, another ſpecies of reclaimed animals, *viz.* cats, were looked upon as creatures of intrinſic value; and the killing or ſtealing one was a grievous crime, and ſubjected the offender to a fine; eſpecially if it belonged to the king's houſhold, and was the *cuſtos horrei regii*, for which there was a very peculiar forfeiture [w]. And thus much of qualified property in wild animals, reclaimed *per induſtriam*.

2. A QUALIFIED property may alſo ſubſiſt with relation to animals *ferae naturae*, *ratione impotentiæ*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneys or other creatures make their neſts or burrows in my land, and have young ones there; I have a qualified property in thoſe young ones till ſuch time as they can fly or run away, and then my property expires [x]: but, till then, it is in ſome caſes treſpaſs, and in others, fe-

[r] Lamb. Eiren. 275.
[s] 7 Rep. 18. 3 Inſt. 109.
[t] Bro. *Abr. tit. treſpaſs.* 407.
[u] 1 Hal. P. C. 512. 1 Hawk. P. C. c. 33.
[w] "*Si quis felem, horrei regii cuſtodem, occideret vel furto abſtulerit, felis ſumma cauda ſuſpendatur, capite aream attingente, et in eam grana tritici effundantur, uſquedum ſummitas caudae tritico co-operiatur.*" Wotton. *LL. Wall.* l. 3. *c.* 5. § 5. An amercement ſimilar to which, ſir Edward Coke tells us, (7 Rep. 18.) there antiently was for ſtealing ſwans; only ſuſpending them by the beak, inſtead of the tail.
[x] *Carta de foreſt.* 9 Hen. III. c. 13.

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he pleaſes; or, if they are not confined, unleſs they are reduced to tameneſs, and known by the thief to be ſo. 1 *Hawk. b.* 1. *c.* 23. *ſ.* 26.

lony, for a ſtranger to take them away[y]. For, here, as the owner of the land has it in his power to do what he pleaſes with them, the law therefore veſts a property in him of the young ones, in the ſame manner as it does of the old ones if reclaimed and confined: for theſe cannot through weakneſs, any more than the others through reſtraint, uſe their natural liberty and forſake him.

3. A MAN may, laſtly, have a qualified property in animals *ferae naturae, propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in ex-
[395] cluſion of other perſons. Here he has a tranſient property in theſe animals, uſually called game, ſo long as they continue within his liberty[z]; and may reſtrain any ſtranger from taking them therein: but the inſtant they depart into another liberty, this qualified property ceaſes. The manner, in which this privilege is acquired, will be ſhewn in a ſubſequent chapter.

THE qualified property which we have hitherto conſidered extends only to animals *ferae naturae*, when either reclaimed, impotent, or privileged. Many other things may alſo be the objects of qualified property. It may ſubſiſt in the very elements, of fire or light, of air, and of water. A man can have no abſolute permanent property in theſe, as he may in the earth and land; ſince theſe are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownerſhip, which laſts ſo long as they are in actual uſe and occupation, but no longer. If a man diſturbs another, and deprives him of the lawful enjoyment of theſe; if one obſtructs another's antient windows[a], corrupts the air of his houſe or gardens[b], fouls his water[c], or unpens and lets it out, or if he diverts an antient watercourſe that uſed to run to the other's mill or meadow[d], the law will animadvert

[y] 7 Rep. 17. Lamb. Eiren. 274.

[z] Cro. Car. 554. Mar. 48. 5 Mod. 376. 12 Mod. 144.

[a] 9 Rep. 58.

[b] *Ibid.* 59. Lut. 92.

[c] 9 Rep. 59.

[d] 1 Leon. 273. Skin. 389.

hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

THESE kinds of qualification in property depend upon the peculiar circumstances of the subject matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. [396] As in case of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, immediately, his possession also [e]. So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of re-payment, *&c*; and so too is that of the pledgee, which depends upon it's non-performance [f]. The same may be said of goods distrained for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distreinor, or party distreined upon; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate,

[e] 1 Roll. Abr. 607.

[f] Cro. Jac. 245.

a shepherd

a ſhepherd of ſheep, and the like, hath not any property or poſſeſſion either abſolute or qualified, but only a mere charge or overſight [g].

HAVING thus conſidered the ſeveral diviſions of property in *poſſeſſion*, which ſubſiſts there only, where a man hath both the right and alſo the occupation of the thing; we will proceed next to take a ſhort view of the nature of property in *action*, or ſuch where a man hath not the occupation, but merely a bare right to occupy the thing in queſtion; the poſſeſſion whereof may however be recovered by a ſuit or action at law: from whence the thing ſo recoverable is called [397] a thing, or *choſe, in action* [h]. Thus money due on a bond is a *choſe* in action; for a property in the debt veſts at the time of forfeiture mentioned in the obligation, but there is no poſſeſſion till recovered by courſe of law. If a man promiſes, or covenants with me, to do any act, and fails in it, whereby I ſuffer damage, the recompenſe for this damage is a *choſe* in action: for though a right to ſome recompenſe veſts in me, at the time of the damage done, yet what and how large ſuch recompenſe ſhall be, can only be aſcertained by verdict; and the poſſeſſion can only be given me by legal judgment and execution. In the former of theſe caſes the ſtudent will obſerve, that the property, or right of action, depends upon an *expreſs* contract or obligation to pay a ſtated ſum: and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he ſhall pay me the damages I ſuſtain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either expreſs or implied; which are the only regular means of acquiring a *choſe* in action, and of the nature of which we ſhall diſcourſe at large in a ſubſequent chapter.

g 3 Inſt. 108.

h The ſame idea, and the ſame denomination, of property prevailed in the civil law. "*Rem in bonis noſtris habere* "*intelligimur, quotiens ad recuperandum* "*eam actionem habeamus.*" (*Ff* 41. 1. 52.) And again, "*aeque bonis adnu*-"*merabitur etiam, ſi quid eſt in actioni*-"*bus, petitionibus, perſecutionibus. Nam* "*et haec in bonis eſſe videntur.*" (*Ff.* 50. 16. 49.)

AT present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or it's equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather in *potentia* than in *esse*: though the owner may have as absolute a property in, and be as well entitled to, such things in action, as [398] to things in possession.

AND, having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*; in conformity to the method before observed in treating of the property of things real.

FIRST, as to the *time* of *enjoyment*. By the rules of the antient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted[i]: though originally that indulgence was only shewn, when merely the use of the goods, and not the goods themselves, was given to the first legatee[k]; the property being supposed

i 1 Equ. Caf. abr. 360. k Mar. 106.

to

to continue all the time in the executor of the devisor. But now that distinction is disregarded [l]: and therefore if a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good. But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation [m]. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

[399] NEXT, as to the *number* of *owners*. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in coparcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements [n]. And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship [o]. So also if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common [p]; as we have formerly seen [q], the same words would have done, in regard to real estates (2). But, for the encouragement of husbandry

[l] 2 Freem. 206.
[m] 1 P. Wms. 290.
[n] Litt. § 282. 1 Vern. 482.
[o] Litt. § 321.
[p] 1 Equ. Cas. abr. 292.
[q] pag. 193.

(2) Residuary legatees and executors are joint-tenants, unless the testator uses some expression which converts their interest into a tenancy

and trade, it is held that a ſtock on a farm, though occupied jointly, and alſo a ſtock uſed in a joint undertaking, by way of partnerſhip in trade, ſhall always be conſidered as common and not as joint property, and there ſhall be no ſurvivorſhip therein [r].

[r] 1 Vern. 217. Co. Litt. 182.

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a tenancy in common; and if one dies before a diviſion or ſeverance of the ſurplus, the whole that is undivided will paſs to the ſurvivor or ſurvivors. 2 *P. Wms.* 113. 3 *Bro.* 455. See p. 193. *ante.*

CHAPTER THE TWENTY-SIXTH.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE are next to conſider the *title* to things perſonal, or the various means of *acquiring*, and of *loſing*, ſuch property as may be had therein: both which conſiderations of gain and loſs ſhall be blended together in one and the ſame view, as was done in our obſervations upon real property; ſince it is for the moſt part impoſſible to contemplate the one, without contemplating the other alſo. And theſe methods of acquiſition or loſs are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By cuſtom. 5. By ſucceſſion. 6. By marriage. 7. By judgment. 8. By gift, or grant. 9. By contract. 10. By bankruptcy. 11. By teſtament. 12. By adminiſtration.

AND, firſt, a property in goods and chattels may be acquired by *occupancy:* which we have more than once [a] remarked, was the original and only primitive method of acquiring any property at all; but which has ſince been reſtrained and abridged, by the poſitive laws of ſociety, in order to maintain peace and harmony among mankind. For this purpoſe, by the laws of England, gifts, and contracts, teſtaments, legacies, and adminiſtrations have been introduced and countenanced, in order to transfer and continue that property and poſſeſſion in things perſonal, which

[a] See pag. 3. 8. 258.

has once been acquired by the owner. And, where ſuch things are found without any other owner, they for the moſt part belong to the king by virtue of his prerogative; except in ſome few inſtances, wherein the original and natural right of occupancy is ſtill permitted to ſubſiſt, and which we are now to conſider.

1. THUS, in the firſt place, it hath been ſaid, that any body may ſeiſe to his own uſe ſuch goods as belong to an alien enemy[b]. For ſuch enemies, not being looked upon as members of our ſociety, are not entitled during their ſtate of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to ſeiſe upon their chattels, without being compelled as in other caſes to make reſtitution or ſatisfaction to the owner. But this, however generally laid down by ſome of our writers, muſt in reaſon and juſtice be reſtrained to ſuch captors as are authorized by the public authority of the ſtate, reſiding in the crown[c]; and to ſuch goods as are brought into this country by an alien enemy, after a declaration of war, without a ſafe-conduct or paſſport. And therefore it hath been holden[d], that where a foreigner is reſident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be ſeiſed. It hath alſo been adjudged, that if an enemy take the goods of an Engliſhman, which are afterwards retaken by another ſubject of this kingdom, the former owner ſhall loſe his property therein, and it ſhall be indefeaſibly veſted in the ſecond taker; unleſs they were retaken the ſame day, and the owner before ſun-ſet puts in his claim of property[e]. Which is agreeable to the law of nations, as underſtood in the time of Grotius[f], even with regard to captures made at ſea; which were held to be the property of the captors after a poſſeſſion of twenty-four hours; though the modern authorities[g] require, that before the property can

b Finch. L. 178.

c Freem. 40.

d Bro. *Abr. tit. propertie.* 38. *forfeiture.* 57.

e *Ibid.*

f *de j. b. & p. l.* 3. *c.* 6. § 3.

g Bynkerſh. *quæſt. jur. publ. l.* 4. Rocc. *de Aſſecur. not.* 66.

be

be changed, the goods muſt have been brought into port, and have continued a night *intra praeſidia*, in a place of ſafe cuſtody, ſo that all hope of recovering them was loſt.

AND, as in the goods of an enemy, ſo alſo in his *perſon*, a man may acquire a ſort of qualified property, by taking him a priſoner in war[h]; at leaſt till his ranſom be paid[j]. And this doctrine ſeems to have been extended to negro-ſervants[i], who are purchaſed, when captives, of the nations with whom they are at war, and are therefore ſuppoſed to continue in ſome degree the property of their maſters who buy them: though, accurately ſpeaking, that property (if it indeed continues) conſiſts rather in the perpetual *ſervice*, than in the *body* or *perſon* of the captive[k].

2. THUS again, whatever moveables are found upon the ſurface of the earth, or in the ſea, and are unclaimed by any owner, are ſuppoſed to be abandoned by the laſt proprietor; and, as ſuch, are returned into the common ſtock and maſs of things: and therefore they belong, as in a ſtate of nature, to the firſt occupant or fortunate finder, unleſs they fall within the deſcription of waifs, or eſtrays, or wreck, or hidden treaſure; for theſe, we have formerly ſeen[l], are veſted by law in the king, and form a part of the ordinary revenue of the crown.

3. THUS too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an antient window overlooking my neighbour's ground, he may not erect any blind to obſtruct the light: but if I build my houſe cloſe to his wall, which darkens it,

h Bro. *Abr. tit. propertie.* 18.

j We meet with a curious writ of treſpaſs in the regiſter (102.) for breaking a man's houſe, and ſetting ſuch his priſoner at large. "*Quare domum ipſius* "*A. apud W. (in qua idem A. quendam* "*H. Scotum per ipſum A. de guerra captum tanquam priſonem ſuum, quouſque* "*ſibi de centum libris, per quas idem H.* "*redemptionem ſuam cum praefato A. pro* "*vita ſua ſalvanda fecerat ſatisfactum* "*foret, detinuit) fregit, et ipſum H. cepit et abduxit, vel quo voluit abire* "*permiſit, &c.*"

i 2 Lev. 201.

k Carth. 396. Ld Raym. 147. Salk. 667.

l Book. I. ch. 8.

I cannot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbour makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nusance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbour's prior mill, or his meadow: for he hath by the first occupancy acquired a property in the current.

4. WITH regard likewise to animals *ferae naturae*, all mankind had by the original grant of the creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seised them, they become while living his *qualified* property, or, if dead, *are absolutely* his own: so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offence, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aërial, or aquatic animals as go under the denomination of *game*; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege (1). But those animals which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; and in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly:

(1) See this controverted by the Editor in page 419, note (10).

but the difference, at present made, arises merely from the positive municipal law.

5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblements*, by any *possessor*
[404] of the land who hath sown or planted it, whether he be owner of the inheritance, or of a less estate: which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels (2). They were devisable by testament before the statute of wills [m], and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action [n]: and by the statute 11 Geo. II. c. 19. though not by the common law [o], they may be distreined for rent arrere. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given [p]; and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distreinable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny, before they are severed from the ground [q].

6. The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and

m Perk. § 512.

n Bro. *Abr. tit. emblements.* 21. 5 Rep. 116.

o 1 Roll. Abr. 666.

p page 122. 146.

q 3 Inst. 109.

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(2) The right to emblements does not seem to be aptly referred to the principle of occupancy; for they are the continuation of an inchoate, and not the acquisition of an original, right.

utensils,

utenſils, the original owner of the thing was entitled by his right of poſſeſſion to the property of it under ſuch it's ſtate of improvement[r] (3): but if the thing itſelf, by ſuch operation, was changed into a different ſpecies, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a ſatisfaction to the former proprietor for the materials, which he had ſo converted[s]. And theſe doctrines are implicitly copied and adopted by our Bracton[t], and have ſince been confirmed by many reſolutions of the courts[u]. It hath even been held, [405] that if one takes away and cloaths another's wife or ſon, and afterwards they return home, the garments ſhall ceaſe to be his property who provided them, being annexed to the perſon of the child or woman[w].

7. BUT in the caſe of *confuſion* of goods, where thoſe of two perſons are ſo intermixed, that the ſeveral portions can be no longer diſtinguiſhed, the Engliſh law partly agrees with, and partly differs from, the civil. If the intermixture be by conſent, I apprehend that in both laws the proprietors have an intereſt in common, in proportion to their reſpective ſhares[x]. But if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowlege, or caſts gold in like manner into another's melting pot or crucible, the civil law, though it gives the ſole property of the whole to him who has not interfered in

r *Inſt.* 2. 1. 25, 26. 31. *Ff.* 6. 1. 5.
s *Inſt.* 2. 1. 25. 34.
t *l.* 2. *c.* 2 & 3.
u Bro. *Abr. tit. propertie.* 23. Moor. 20. Poph. 38.
w Moor. 214.
x *Inſt.* 2. 1. 27, 28. 1 Vern. 217.

(3) This alſo has long been the law of England; for it is laid down in the Year-books, that whatever alteration of form any property has undergone, the owner may ſeiſe it in it's new ſhape, if he can prove the identity of the original materials; as if leather be made into ſhoes, cloth into a coat, or if a tree be ſquared into timber, or ſilver melted or beat into a different figure. 5 *Hen. VII. fo.* 15. 12 *Hen. VIII. fo.* 10.

the mixture, yet allows a ſatisfaction to the other for what he has ſo improvidently loſt [y]. But our law, to guard againſt fraud, gives the entire property, without any account, to him whoſe original dominion is invaded, and endeavoured to be rendered uncertain, without his own conſent [z].

8. THERE is ſtill another ſpecies of property, which (if it ſubſiſts by the common law) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; ſince the right of occupancy itſelf is ſuppoſed by Mr. Locke [a], and many others [b], to be founded on the perſonal labour of the occupant. And this is the right, which an author may be ſuppoſed to have in his own original literary compoſitions: ſo that no other perſon without his leave may publiſh or make profit of the copies. When a man by the exertion of his rational powers has produced an
[406] original work, he ſeems to have clearly a right to diſpoſe of that identical work as he pleaſes, and any attempt to vary the diſpoſition he has made of it, appears to be an invaſion of that right. Now the identity of a literary compoſition conſiſts intirely in the *ſentiment* and the *language;* the ſame conceptions, cloathed in the ſame words, muſt neceſſarily be the ſame compoſition: and whatever method be taken of exhibiting that compoſition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is ſo exhibited; and no other man (it hath been thought) can have a right to exhibit it, eſpecially for profit, without the author's conſent. This conſent may perhaps be tacitly given to all mankind, when an author ſuffers his work to be publiſhed by another hand, without any claim or reſerve of right, and without ſtamping on it any marks of ownerſhip; it being then a preſent to the public, like building a church or bridge, or laying out a new highway: but, in caſe the author ſells a ſingle book, or totally grants the copyright, it hath

[y] *Inſt.* 2. 1. 28.

[z] Poph. 38. 2 Bulſtr. 325. 1 Hal. P. C. 513. 2 Vern. 516.

[a] on Gov. part 2. ch. 5.

[b] See page 8.

been

been ſuppoſed, in the one caſe, that the buyer hath no more right to multiply copies of that book for ſale, than he hath to imitate for the like purpoſe the ticket which is bought for admiſſion to an opera or a concert; and that, in the other, the whole property, with all it's excluſive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the excluſive property of the manuſcript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or publiſhed; yet from the inſtant of publication, the excluſive right of an author or his aſſigns to the ſole communication of his ideas immediately vaniſhes and evaporates; as being a right of too ſubtile and unſubſtantial a nature to become the ſubject of property at the common law, and only capable of being guarded by poſitive ſtatutes and ſpecial proviſions of the magiſtrate.

THE Roman law adjudged, that if one man wrote any thing on the paper or parchment of another, the writing ſhould belong to the owner of the blank materials [c]: meaning thereby the mechanical operation of writing, for which it directed the [407] ſcribe to receive a ſatisfaction; for, in works of genius and invention, as in painting on another man's canvas, the ſame law [d] gave the canvas to the painter. As to any other property in the works of the underſtanding, the law is ſilent; though the ſale of literary copies, for the purpoſes of recital or multiplication, is certainly as antient as the times of Terence [e], Martial [f], and Statius [g]. Neither with us in England hath there been (till very lately) any final [h] determination upon the right of authors at the common law (4).

c *Si in chartis membraniſve tuis carmen vel hiſtoriam vel orationem Titius ſcripſerit, hujus corporis non Titius ſed tu dominus eſſe videris. Inſt.* 2. 1. 33. See page 404.

d *Ibid.* § 34.

e *Prol. in Eunuch.* 20.

f *Epigr.* i. 67. iv. 72. xiii. 3. xiv. 194.

g *Juv.* vii. 83.

h Since this was firſt written, it was determined in the caſe of *Miller v. Taylor* in *B. R. Paſch.* 9 Geo. III. 1769, that an excluſive and permament copyright in authors ſubſiſted by the common law. But afterwards, in the caſe of *Donaldſon v. Becket*, before the houſe of lords, 22 *Febr.* 1774, it was held that no copyright now ſubſiſts in authors, after the expiration of the ſeveral terms created by the ſtatute of queen Anne.

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(4) Whether the productions of the mind could communicate a right of property or of excluſive enjoyment in reaſon and nature; and

BUT whatever inherent copyright might have been ſuppoſed to ſubſiſt by the common law, the ſtatute 8 Ann. c. 19. (a-

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and if ſuch a moral right exiſted, whether it was recognized and ſupported by the common law of England; and whether the common law was intended to be reſtrained by the ſtatute of queen Anne; are queſtions, upon which the learning and talents of the higheſt legal characters in this kingdom have been powerfully and zealouſly exerted.

Theſe queſtions were finally ſo determined that an author has no right at preſent beyond the limits fixed by the ſtatute. But as that determination was contrary to the opinion of lord Mansfield, the learned Commentator, and ſeveral other judges, every perſon may ſtill be permitted to indulge his own opinion upon the propriety of it, without incurring the imputation of arrogance. Nothing is more erroneous than the common practice of referring the origin of moral rights, and the ſyſtem of natural equity, to that ſavage ſtate, which is ſuppoſed to have preceded civilized eſtabliſhments; in which literary compoſition, and of conſequence the right to it, could have no exiſtence. But the true mode of aſcertaining a moral right I conceive is to inquire, whether it is ſuch as the reaſon, the cultivated reaſon, of mankind muſt neceſſarily aſſent to.

No propoſition ſeems more conformable to that criterion, than that every one ſhould enjoy the reward of his labour, the harveſt where he has ſown, or the fruit of the tree which he has planted.

And if any private right ought to be preſerved more ſacred and inviolable than another, it is that where the moſt extenſive benefit flows to mankind from the labour by which it is acquired. Literary property, it muſt be admitted, is very different in its nature from a property in ſubſtantial and corporeal objects, and this difference has led ſome to deny its exiſtence as property; but whether it is *ſui generis*, or under whatever denomination of rights it may more properly be claſſed, it ſeems founded upon the ſame principle of general utility to ſociety, which is the baſis of all other moral rights and obligations.

Thus conſidered, an author's copyright ought to be eſteemed an inviolable right, eſtabliſhed in ſound reaſon and abſtract morality.

No leſs than eight of the twelve judges were of opinion that this was a right allowed and perpetuated by the common law of England; but ſix held, either that it did not exiſt, or that the enjoyment of it was abridged by the ſtatute of queen Anne, and that all

mended by ſtatute 15 Geo. III. c. 53.) hath now declared that the author and his aſſigns ſhall have the ſole liberty of printing and reprinting his works for the term of fourteen years, *and no longer* [i]; and hath alſo protected that property by additional penalties and forfeitures: directing farther, that if, at the end of that term, the author himſelf be living, the right ſhall then return to him for another term of the ſame duration (5):—and a ſimilar privilege is extended to the inventors

[i] By ſtatute 15 Geo. III. c. 53. ſome additional privileges in this reſpect are granted to the univerſities, and certain other learned ſocieties.

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all remedy for the violation of it was taken away after the expiration of the terms ſpecified in the act; and agreeable to that opinion was the final judgment of the lords.

See the arguments at length of the judges of the king's bench, and the opinions of the reſt, in 4 *Burr.* 2303.

In Ireland there is yet no ſtatute to protect the copyright of authors. To that circumſtance we ought perhaps to attribute the paucity of publications in Ireland upon law, hiſtory, and thoſe ſciences, which require laborious perſeverance. Men of genius and learning in that country are ſtimulated only by the incentive, which lord Camden ſplendidly deſcribed in the concluſion of his argument againſt literary property. "Glory is the reward of "ſcience, and thoſe who deſerve it ſcorn all meaner views. I "ſpeak not of the ſcribblers for bread, who teaze the preſs with "their wretched productions. Fourteen years are too long a "privilege for their periſhable traſh. It was not for gain that "Bacon, Newton, Milton, Locke, inſtructed and delighted the "world. When the bookſeller offered Milton five pounds for his "Paradiſe Loſt, he did not reject it, and commit his poem to the "flames, nor did he accept the miſerable pittance as the reward "of his labour; he knew that the real price of his work was im-"mortality, and that poſterity would pay it."

(5) Where an author transfers all his right or intereſt in a publication, upon his ſurviving the firſt fourteen years, the ſecond term will reſult to his aſſignee and not to himſelf. 2 *Bro.* 80. Muſical compoſitions have been held to be within the meaning and protection of the ſtatute. *Cowp.* 623. A repreſentation of a dramatic performance upon the ſtage is not a publication, for which the author can maintain an action as for an invaſion of his right.

of prints and engravings, for the term of eight and twenty years, by the ſtatutes 8 Geo. II. c. 13. and 7 Geo. III. c. 38. beſides an action for damages, with double coſts, by ſtatute 17 Geo. III. c. 57 (6). All which parliamentary protections

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5 *T. R.* 245. Yet no one has a right to take down a play in ſhort-hand, and to print it before it is publiſhed by the author. *Amb.* 694. A fair and *bonâ fide* abridgment of any book is conſidered a new work; and however it may injure the ſale of the original, yet it is not deemed in law to be a piracy or a violation of the author's copyright. 1 *Bro.* 451. 2 *Atk.* 141.

An action may be brought, or an injunction obtained in a court of equity, though the publication be not entered in the regiſter of the ſtationers company, 1 *Bl. Rep.* 330; but no one can be proſecuted for the penalties introduced by the ſtatute, *viz.* a forfeiture of one penny for every ſheet, and the ſheets are to be defaced, unleſs the work is entered according to the directions of 15 Geo. III. c. 53. which ſtatute has ſecured to the univerſities and colleges therein mentioned, a perpetuity in the copyright of all books given or deviſed in truſt for them by the authors. By the 12 Geo. II. c. 36. if any book be originally written and publiſhed in this country, and be afterwards reprinted abroad, and be imported and expoſed to ſale here, the importer and ſeller ſhall forfeit all ſuch books to be cancelled; and for every offence ſhall forfeit alſo five pounds, and double the value of the books, to be recovered with coſts. Every ſale of one book, or a parcel, is a diſtinct offence, by which a new penalty is incurred. 3 *T. R.* 509. Under this ſtatute it ſeems immaterial whether the author's copyright is extinct or not, if the book has been reprinted in England within twenty years. This ſtatute was intended for the encouragement of printing in this country.

(6) The principal differences in theſe three ſtatutes concerning prints ſeem to be theſe: the 8 Geo. II. gives an excluſive privilege of publiſhing to thoſe who invent or deſign any print, for fourteen years only; the 7 Geo. III. extends the term to twenty-eight years abſolutely, to all who either invent the deſign or make a print from another's deſign or picture; and thoſe who copy ſuch prints within that time, forfeit all their copies, to be deſtroyed, and 5*s.* for each copy; the 17 Geo. III. gives the proprietor an action to recover damages and double coſts for the injury he has ſuſtained by the violation of his right.

 appear

appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I. c. 3. which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee [k] (7).

[k] 1 Vern. 62.

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(7) The patent is granted upon condition that the invention is new, or new in this country; and that the patentee shall deliver a specification of his invention, containing such a description, plan, or model of the machine or article, as to be intelligible to every artist conversant in the same trade or manufactory.

Or the invention must be so described that the public may, at the end of fourteen years, have the use of it in as cheap and beneficial a manner as the patentee himself uses it. Hence if the specification be in any part materially false, defective, obscure, or give directions which tend to mislead the public, the patent is against law and cannot be supported. The specifications are preserved in an office for public inspection. Some patents, in very valuable manufactures, have been declared void, on account of the designed obscurity of the specification. *Bull. N. P.* 76. 1 *T. R.* 602.

CHAPTER THE TWENTY-SEVENTH.

OF TITLE BY PREROGATIVE, AND FORFEITURE.

A SECOND method of acquiring property in perſonal chattels is by the *king's prerogative:* whereby a right may accrue either to the crown itſelf, or to ſuch as claim under the title of the crown, as by the king's grant, or by preſcription, which ſuppoſes an antient grant.

SUCH in the firſt place are all *tributes, taxes,* and *cuſtoms,* whether conſtitutionally inherent in the crown, as flowers of the prerogative and branches of the *cenſus regalis* or antient royal revenue, or whether they be occaſionally created by authority of parliament; of both which ſpecies of revenue we treated largely in the former volume. In theſe the king acquires and the ſubject loſes a property, the inſtant they become due: if paid, they are a *choſe* in poſſeſſion; if unpaid, a *choſe* in action. Hither alſo may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his antient prerogative, or by particular modern ſtatutes: which revenues created by ſtatute do always aſſimilate, or take the ſame nature, with the antient revenues; and may therefore be looked upon as ariſing from a kind of artificial or ſecondary prerogative. And, in either caſe, the owner of the thing forfeited, and the perſon fined or amerced, loſe and part with the property of the forfeiture, fine, or amercement, the inſtant the king or his grantee acquires it.

IN

IN these several methods of acquiring property by prerogative there is also this peculiar quality, that the king cannot have a *joint* property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person [a]; but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel [b]; and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt [c]. For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but where they interfere, his is always preferred to that of another person [d]: from which two principles it is a necessary consequence, that the innocent though unfortunate partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances (1).

a See pag. 184.

b Fitzh. *Abr. t. dette.* 38. Plowd. 243.

c Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. 10 Mod. 245.

d Co. Litt. 30.

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(1) If a joint-tenant of any chattel interest commits suicide, the right to the whole chattel becomes vested in the king. This was decided after much solemn and subtle argument in 3 Eliz. The case is reported by Plowd. 262. Eng. ed. Sir James Hales, a judge of the common pleas, and his wife were joint-tenants of a term for years; sir James drowned himself, and was found *felo de se*; and it was held that the term did not survive to the wife, but that sir James's interest was forfeited to the king by the felony, and that it consequently drew the wife's interest along with it. The argument

THIS doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the
[410] like; which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being *bona vacantia*, and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

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ment of lord Chief Justice Dyer is remarkably curious: "The felony (says he) is attributed to the act; which act is always done "by a living man, and in his lifetime, as my brother Brown said; "for he said sir James Hales was dead; and how came he to his "death? It may be answered by drowning; and who drowned him? "sir James Hales; and when did he drown him? in his lifetime. "So that sir James Hales being alive, caused sir James Hales to "die; and the act of the living man was the death of the dead "man. And then for this offence it is reasonable to punish the "living man who committed the offence, and not the dead man. "But how can he be said to be punished alive, when the punishment comes after his death? Sir, this can be done no other way "but by divesting out of him, from the time of the act done in his "lifetime, which was the cause of his death, the title and property of those things which he had in his lifetime."

This must have been a case of notoriety in the time of Shakespeare; and it is not improbable that he intended to ridicule this legal logic by the reasoning of the grave-digger in Hamlet upon the drowning of Ophelia. See Sir J. Hawkins's note in Stephens's edition.

THERE

THERE is alſo a kind of prerogative *copyright* ſubſiſting in certain books, which is held to be veſted in the crown upon different reaſons. Thus, 1. The king, as the executive magiſtrate, has the right of promulging to the people all acts of ſtate and government. This gives him the excluſive privilege of printing, at his own preſs, or that of his grantees, all *acts of parliament*, *proclamations*, and *orders of council*. 2. As ſupreme head of the church, he hath a right to the publication of all *liturgies* and books of *divine ſervice*. 3. He is alſo ſaid to have a right by purchaſe to the copies of ſuch *law books*, *grammars*, and other compoſitions, as were compiled or tranſlated at the expence of the crown. And upon theſe two laſt principles, combined, the excluſive right of printing the tranſlation of the *bible* is founded.

THERE ſtill remains another ſpecies of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of ſuch animals *ferae naturae*, as are known by the denomination of *game*, with the right of purſuing, taking, and deſtroying them: which is veſted in the king alone, and from him derived to [411]
ſuch of his ſubjects as have received the grants of a chaſe, a park, a free warren, or free fiſhery. This may lead us into an inquiry concerning the original of theſe franchiſes, or royalties, on which we touched a little in a former chapter [f]: the right itſelf being an incorporeal hereditament, though the fruits and profits of it are of a perſonal nature.

IN the firſt place then we have already ſhewn, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peaſant, has an equal right of purſuing, and taking to his own uſe, all ſuch creatures as are *ferae naturae*, and therefore the property of nobody, but liable to be ſeiſed by the firſt occupant. And ſo it was held by the imperial law, even ſo late as Juſtinian's time: "*ferae* "*igitur beſtiae, et volucres, et omnia animalia quae mari, cœlo,* "*et terra naſcuntur, ſimul atque ab aliquo capta fuerint, jure*

[f] pag. 38, 39.

"*gentium*

" *gentium ſtatim illius eſſe incipiant. Quod enim nullius eſt, id* " *naturali ratione occupanti conceditur*[g]." But it follows from the very end and conſtitution of ſociety, that this natural right, as well as many others belonging to man as an individual, may be reſtrained by poſitive laws enacted for reaſons of ſtate, or for the ſuppoſed benefit of the community. This reſtriction may be either with reſpect to the *place* in which this right may, or may not, be exerciſed; with reſpect to the *animals* that are the ſubject of this right; or with reſpect to the *perſons* allowed or forbidden to exerciſe it. And, in conſequence of this authority, we find that the municipal laws of many nations have exerted ſuch power of reſtraint; have in general forbidden the entering on another man's grounds, for any cauſe, without the owner's leave; have extended their protection to ſuch particular animals as are uſually the objects of purſuit; and have inveſted the prerogative of hunting and taking ſuch animals in the ſovereign of the ſtate only, and ſuch as he ſhall authoriſe[h]. Many reaſons have concurred for making theſe conſtitutions: as, 1. For the encouragement of agriculture and improvement of lands, by giving every
[412] man an excluſive dominion over his own ſoil. 2. For preſervation of the ſeveral ſpecies of theſe animals, which would ſoon be extirpated by a general liberty. 3. For prevention of idleneſs and diſſipation in huſbandmen, artificers, and others of lower rank; which would be the unavoidable conſequence of univerſal licence. 4. For prevention of popular inſurrections and reſiſtance to the government, by diſarming the bulk of the people[i]: which laſt is a reaſon oftner meant, than avowed, by the makers of foreſt or game laws (2). Nor,

g *Inſt.* 2. 1. 12.
h Puff. L. N. l. 4. c. 6. § 5.
i Warburton's alliance. 324.

(2) I am inclined to think that this reaſon did not operate upon the minds of thoſe who framed the game laws of this country; for in ſeveral ancient ſtatutes the avowed object is to encourage the uſe of the long bow, the moſt effective armour then in uſe: and even ſince the modern practice of killing game with a gun has prevailed,

certainly, in these prohibitions is there any *natural* injustice, as some have weakly enough supposed: since, as Puffendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him (3).

YET, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowlege that, in their present shape, they owe their immediate original to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to *persons* or *animals*, so far regarded the article of *place*, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut aucupandi* "*gratia, potest a domino prohiberi ne ingrediatur*[k]." For if there can, by the law of nature, be any inchoate imperfect

[k] *Inst.* 2. 1. § 12.

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prevailed, every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game.

(3) I can by no means accede even to the combined authority of Puffendorf and the learned Judge, that there is not any natural injustice in abridging a person of the means of acquiring a future property. The right of acquiring future property may be more valuable than the right of retaining the present possession of property. A right of common, like all other rights, must bear a certain value; and it certainly is as great injustice to deprive any one of the right of hunting, fishing, or of digging in a public mine, as it is to take from him the value of that right in money or any other species of private property.

property

property ſuppoſed in wild animals before they are taken, it ſeems moſt reaſonable to fix it in him upon whoſe land they are found. And as to the other reſtriction, which relates to *perſons* and not to *place*, the pontifical or canon law [l] inter-
[413] dicts "*venationes, et ſylvaticas vagationes cum canibus et acci-* "*pitribus*," to all *clergymen* without diſtinction; grounded on a ſaying of St. Jerom [m] (4), that it never is recorded that theſe diverſions were uſed by the ſaints, or primitive fathers. And the canons of our Saxon church, publiſhed in the reign of king Edgar [n], concur in the ſame prohibition: though our ſecular laws, at leaſt after the conqueſt, did even in the times of popery diſpenſe with this canonical impediment; and ſpiritual perſons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof we may obſerve, that it is to this day a branch of the king's prerogative, at the death of every biſhop, to have his kennel of hounds, or a compoſition in lieu thereof [o] (5).

BUT, with regard to the riſe and original of our preſent civil prohibitions, it will be found that all foreſt and game

l *Decretal. l.* 5. *tit.* 24. *c.* 2.
m *Decret. part.* 1. *diſt.* 34. *l.* 1.
n *cap.* 64.
o 4 Inſt. 309.

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(4) viz. *Venatorem nunquam legimus ſanctum.*

(5) When archbiſhop Abbot by an unfortunate accident had killed a park-keeper in ſhooting at a deer with a croſs-bow, though it was allowed no blame could be imputed to the archbiſhop but from the nature of the diverſion, yet it was thought to bring ſuch ſcandal upon the church that an apology was publiſhed upon the occaſion, which was warmly and learnedly anſwered by ſir Henry Spelman, who maintained that the archbiſhop was in the exerciſe of an act prohibited by the canons and ordinances of the church, and that he was even diſqualified from exerciſing his ſpiritual functions. The king referred the conſideration of the ſubject to the lord keeper and ſeveral of the judges and biſhops, who recommended it to his majeſty to grant his grace a diſpenſation *in majorem cautelam, ſi qua forte ſit irregularitas*; which was done accordingly. See *Reliquiæ, Spelm.* 107.

laws

laws were introduced into Europe at the ſame time, and by the ſame policy, as gave birth to the feodal ſyſtem; when thoſe ſwarms of barbarians iſſued from their northern hive, and laid the foundation of moſt of the preſent kingdoms of Europe, on the ruins of the weſtern empire. For when a conquering general came to ſettle the oeconomy of a vanquiſhed country, and to part it out among his ſoldiers or feudatories, who were to render him military ſervice for ſuch donations; it behoved him, in order to ſecure his new acquiſitions, to keep the *ruſtici* or natives of the country, and all who were not his military tenants, in as low a condition as poſſible, and eſpecially to prohibit them the uſe of arms. Nothing could do this more effectually than a prohibition of hunting and ſporting; and therefore it was the policy of the conqueror to reſerve this right to himſelf, and ſuch on whom he ſhould beſtow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal conſtitutions [p], one and the ſame law prohibiting the *ruſtici* in general from carrying arms, and alſo proſcribing the uſe [414] of nets, ſnares, or other engines for deſtroying the game. This excluſive privilege well ſuited the martial genius of the conquering troops, who delighted in a ſport [q], which in it's purſuit and ſlaughter bore ſome reſemblance to war. *Vita omnis*, (ſays Caeſar, ſpeaking of the antient Germans,) *in venationibus atque in ſtudiis rei militaris conſiſtit* [r]. And Tacitus in like manner obſerves, that *quoties bella non ineunt, multum venatibus, plus per otium tranſigunt* [s]. And indeed, like ſome of their modern ſucceſſors, they had no other amuſement to entertain their vacant hours; deſpiſing all arts as effeminate, and having no other learning, than was couched in ſuch rude ditties, as were ſung at the ſolemn carouſals which ſucceeded theſe antient huntings. And it is remarkable that, in thoſe nations where the feodal policy remains the moſt uncorrupted,

p *Feud. l.* 2. *tit.* 27. § 5.

q In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, publiſhed *A. D.* 1205. there is one which prohibits the killing of all game from March to October; that the court and ſoldiery might find plenty enough in the winter, during their receſs from war. (Mod. Univ. Hiſt. iv. 468.)

r *De Bell. Gall. l.* 6. *c.* 20.

s *c.* 15.

rupted, the foreſt or game laws continue in their higheſt rigor. In France all game is properly the king's; and in ſome parts of Germany it is death for a peaſant to be found hunting in the woods of the nobility [t].

WITH us in England alſo, hunting has ever been eſteemed a moſt princely diverſion and exerciſe. The whole iſland was repleniſhed with all ſorts of game in the times of the Britons; who lived in a wild and paſtoral manner, without incloſing or improving their grounds, and derived much of their ſubſiſtence from the chace, which they all enjoyed in common. But when huſbandry took place under the Saxon government, and lands began to be cultivated, improved, and encloſed, the beaſts naturally fled into the woody and deſart tracts; which were called the foreſts, and, having never been diſpoſed of in the firſt diſtribution of lands, were therefore held to belong to the crown. Theſe were filled with great plenty of game, which our royal ſportſmen re-
[415] ſerved for their own diverſion, on pain of a pecuniary forfeiture for ſuch as interfered with their ſovereign. But every freeholder had the full liberty of ſporting upon his own territories, provided he abſtained from the king's foreſts: as is fully expreſſed in the laws of Canute [v], and of Edward the Confeſſor [u]: "*ſit quilibet homo dignus venatione ſua, in* "*ſylva, et in agris, ſibi propriis, et in dominio ſuo: et abſtineat* "*omnis homo a venariis regiis, ubicunque pacem eis habere volue-* "*rit*:" which indeed was the antient law of the Scandinavian continent, from whence Canute probably derived it. "*Cui-* "*que enim in proprio fundo quamlibet feram quoquo modo venari* "*permiſſum* [w]."

HOWEVER, upon the Norman conqueſt, a new doctrine took place; and the right of purſuing and taking all beaſts of chaſe or *venary*, and ſuch other animals as were accounted *game*, was then held to belong to the king, or to ſuch only as were authoriſed under him. And this, as well upon the

t Mattheus *de Crimin.* c. 3. *tit.* 1. Carpzov. *Practic. Saxonic.* p. 2. c. 84.

v c. 77.

u c. 36.

w Stiernhoek *de jure Sveon.* l. 2. c. 8.

principles of the feodal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures at his pleasure: as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are *bona vacantia*, and, having no other owner, belong to the king by his prerogative (6). As therefore the former reason was held to vest in the king a *right* to pursue and take them any where; the latter was supposed to give the king, and such as he should authorize, a *sole* and *exclusive* right.

THIS right, thus newly vested in the crown, was exerted with the utmost rigor, at and after the time of the Norman establishment; not only in the antient forests, but in the new ones which the conqueror made, by laying together vast tracts of country, depopulated for that purpose, and reserved solely for the king's royal diversion; in which were [416] exercised the most horrid tyrannies and oppressions, under colour of forest law, for the sake of preserving the beasts of chase; to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance of the same principle, king John laid a total interdict upon the *winged* as well as the *fourfooted* creation: "*capturam avium per totam Angliam interdixit* [x]." The cruel and insupportable hardships, which these forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feodal rigors and the other exactions introduced by the Norman family; and accordingly we find the immunities of *carta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of *magna carta* itself. By this charter, confirmed in parliament [y], many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained; particularly [z] killing

x M. Paris. 303. y 9 *Hen. III.* z *cap.* 10.

(6) See p. 419, note 10, *post.*

ing the king's deer was made no longer a capital offence, but only puniſhed by a fine, impriſonment, or abjuration of the realm. And by a variety of ſubſequent ſtatutes, together with the long acquieſcence of the crown without exerting the foreſt laws, this prerogative is now become no longer a grievance to the ſubject.

BUT, as the king reſerved to himſelf the *foreſts* for his own excluſive diverſion, ſo he granted out from time to time other tracts of lands to his ſubjects under the names of *chaſes* or *parks* [a], or gave them licence to make ſuch in their own grounds; which indeed are ſmaller foreſts, in the hands of a ſubject, but not governed by the foreſt laws; and by the common law no perſon is at liberty to take or kill any beaſts of chaſe, but ſuch as hath an antient chaſe or park; unleſs they be alſo beaſts of prey.

[417] As to all inferior ſpecies of game, called beaſts and fowls of warren, the liberty of taking or killing them is another franchiſe or royalty, derived likewiſe from the crown, and called *free warren*; a word, which ſignifies preſervation or cuſtody: as the excluſive liberty of taking and killing fiſh in a public ſtream or river is called a *free fiſhery*; of which however no new franchiſe can at preſent be granted, by the expreſs proviſion of *magna carta*, c. 16 [b]. The principal intention of granting to any one theſe franchiſes or liberties was in order to protect the game, by giving the grantee a ſole and excluſive power of killing it himſelf, provided he prevented other perſons. And no man, but he who has a chaſe or free warren, by grant from the crown, or preſcription which ſuppoſes one, can juſtify hunting or ſporting upon another man's ſoil; nor indeed, in thorough ſtrictneſs of common law, either hunting or ſporting at all.

HOWEVER novel this doctrine may ſeem, to ſuch as call themſelves *qualified* ſportſmen, it is a regular conſequence from what has been before delivered; that the ſole right

[a] See pag. 38.

[b] Mirr. c. 5. § 2. See pag. 40.

of

of taking and deſtroying game belongs excluſively to the king (7). This appears, as well from the hiſtorical deduction here made, as becauſe he may grant to his ſubjects an excluſive right of taking them; which he could not do, unleſs ſuch a right was firſt inherent in himſelf. And hence it will follow, that no perſon whatever, but he who has ſuch derivative right from the crown, is by common law entitled to take or kill any beaſts of chaſe, or other game whatſoever. It is true, that, by the acquieſcence of the crown, the frequent grants of free warren in antient times, and the introduction of new penalties of late by certain ſtatutes for preſerving the game, this excluſive prerogative of the king is little known or conſidered; every man, that is exempted from theſe modern penalties, looking upon himſelf as at liberty to do what he pleaſes with the game: whereas the contrary is ſtrictly true, that no man, however well *qualified* he may vulgarly be eſteemed, has a right to encroach on the [418] royal prerogative by the killing of game, unleſs he can ſhew a particular grant of free warren; or a preſcription, which preſumes a grant; or ſome authority under an act of parliament. As for the latter, I recollect but two inſtances wherein an expreſs permiſſion to kill game was ever given by ſtatute; the one by 1 Jac. I. cap. 27. altered by 7 Jac. I. cap. 11. and virtually repealed by 22 & 23 Car. II. c. 25. which gave authority, ſo long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40*l. per annum* in lands of inheritance, or 80*l.* for life or lives, or 400*l.* perſonal eſtate, (and their ſervants) to take partridges and pheaſants upon their own, or their maſter's, free warren, inheritance, or freehold (8): the

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(7) See this controverted in p. 419, n. 10.

(8) The Editor apprehends that what the learned Judge has here ſtated reſpecting the firſt permiſſion, has ariſen from a miſconception of the ſubject. The firſt qualification act is the 13 R. II. c. 13. the title of which is "None ſhall hunt but they who "have a ſufficient living." The preamble ſtates, that "divers "artificers, labourers, ſervants, and grooms, keep grey-hounds "and

other by 5 Ann. c. 14. which empowers lords and ladies of manors to appoint gamekeepers to kill game for the uſe of ſuch lord or lady; which with ſome alteration ſtill ſubſiſts, and plainly ſuppoſes ſuch power not to have been in them before(9). The truth of the matter is, that theſe game laws (of

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" and dogs, and on the holydays, when good chriſtian people be " at church hearing divine ſervice, they go a hunting in parks, " and warrens, and connigrees of lords and others, to the very " great deſtruction of the ſame, and ſometime under ſuch colour " they make their aſſemblies, conferences, and conſpiracies for to " riſe and diſobey their allegiance; it is therefore ordained, that " no artificer, labourer, or other layman, which hath not lands or " tenements to the value of 40 *s.* by the year, nor any prieſt to the " value of 10 *l.* ſhall keep any dogs, nets, nor engines to deſtroy " deer, hares, nor conies, nor other *gentlemen*'s game, upon pain " of one year's impriſonment."

This ſtatute clearly admits and reſtrains their former right: the 1 Jac. I. c. 27. which ſeems intended for the encouragement of hawking, the moſt honourable mode of killing game at that time, begins with a general prohibition to all perſons whatever to kill game with guns, bows, ſetting dogs, and nets; but there is afterwards a proviſo in the act, that it ſhall and may be lawful for perſons of a certain deſcription and eſtate to take pheaſants and partridges, upon their own lands, in the day-time, with nets. This proviſo and permiſſion clearly refers to the preceding prohibition introduced by the ſtatute, and by no means gives a new permiſſion to the perſons thus qualified, which they did not poſſeſs antecedently to that ſtatute.

The Editor truſts that thoſe who will take the trouble to examine the ſtatute, will be convinced of the truth of this remark; and that the correction of this error alone will contribute in ſome degree to the refutation of the doctrine which the learned Judge has advanced in this chapter and other parts of the Commentaries, *viz.* that all the game in the kingdom is the property of the king or his grantees, being uſually the lords of manors, p. 15, *ante*; game is royal property, 4 vol. 174; and the new conſtitutions veſted the ſole property of all the game in England in the king alone. *Ib.* 415.

(9) Gamekeepers were firſt introduced by the preſent qualification act, 22 & 23 Car. II. c. 25. and various regulations have been

which we ſhall have occaſion to ſpeak again in the fourth book of theſe commentaries) do indeed *qualify* nobody, ex-

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been made reſpecting them by ſubſequent ſtatutes. As all theſe ſtatutes ſeem to be in force in ſome degree at preſent, and as it is a ſubject intereſting to ſportſmen, I ſhall ſubjoin a ſhort abſtract of them according to their chronology.

The 22 & 23 Car. II. c. 25. authoriſes lords of manors of the degree of an eſquire to appoint under their hands and ſeals gamekeepers, who ſhall have power within the manor to ſeize guns, dogs, nets, and engines kept by unqualified perſons to deſtroy game; and by a warrant from a juſtice of peace, to ſearch in the day-time the houſes of unqualified perſons upon good ground of ſuſpicion, and to ſeize for the uſe of the lord, or to deſtroy guns, dogs, nets, *&c.* kept for the deſtruction of the game. This ſtatute does not limit the number of thoſe to whom ſuch power and authority may ſtill be given. The 4 & 5 W. & M. c. 23. ſ. 4. gives to theſe gamekeepers the ſame protection in reſiſting offenders in the night-time, as the law affords to the keepers of antient parks. The 5 Ann. c. 14. ſ. 4. permits any lord or lady of a manor to empower gamekeepers to kill game within the manor.

The 9 Ann. c. 25. ſ. 1. enacts, that no lord or lady of a manor ſhall appoint more than one gamekeeper, within one manor, with the power of killing game; and his name ſhall be entered with the clerk of the peace. And by 3 Geo. I. c. 11. the gamekeeper, who ſhall have the power to kill game within the manor, ſhall either be a qualified perſon, a domeſtic ſervant, or a perſon employed to kill for the ſole uſe of the lord or lady of the manor. The only uſe of appointing a qualified perſon a gamekeeper is, to give him the power as before deſcribed of ſeizing the dogs, guns, and other engines of unqualified perſons within the manor.

By the 25 Geo. III. c. 50. and 31 Geo. III. c. 21. every deputation of a gamekeeper ſhall be entered with the clerk of the peace of the county in which the manor lies, and for a certificate thereof ſhall be charged one guinea.

By the 5 Ann. c. 14. ſ. 4. any juſtice of peace may within his county take either game, or dogs, and inſtruments kept for the deſtruction of game, from unqualified perſons, and retain them for his own uſe. But it has been decided, that though gamekeepers are liable to the ſame penalties as unqualified perſons for killing

cept in the inftance of a gamekeeper, to kill game: but only, to fave the trouble and formal procefs of an action by the perfon injured, who perhaps too might remit the offence, thefe ftatutes inflict *additional* penalties, to be recovered either in a regular or fummary way, by any of the king's fubjects, from certain perfons of inferior rank who may be found offending in this particular. But it does not follow that perfons, excufed from thefe additional penalties, are therefore *authorifed* to kill game. The circumftance of having 100 *l. per annum*, and the reft, are not properly qualifications, but exemptions. And thefe perfons, fo exempted from the penalties of the game ftatutes, are not only liable to actions of trefpafs by the owners of the land; but alfo, if they kill game within the limits of any royal franchife, they are liable to the actions of fuch who may have the right of chafe or free warren therein.

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game out of their refpective manors, yet no one is juftified in taking from them their dogs and guns, when they are out of the limits of their lord's manor, even in purfuit of game. 2 *Wilf.* 387. *Rogers* v. *Carter*.

No lord of a manor can grant to another perfon the power of appointing a gamekeeper, without a conveyance alfo of the manor. A right to a manor cannot be tried in a penal action under the game-laws. 5 *T. R.* 19. This power of appointing a gamekeeper has, no doubt, introduced the very erroneous notion, that a lord of a manor has a peculiar right to the game, fuperior to that of any other land-owner within the manor, although his eftate be a fufficient qualification to entitle him to follow the amufements of a fportfman.

Gamkeepers, we have feen, were firft created by 22 & 23 Car. II. c. 25; by the preceding qualification act, 7 Jac. I. c. 11, their power was given to the conftable and headborough; and I apprehend it was transferred to the perfons appointed by lords of manors, for no other reafon than becaufe it was probable they were the moft interefted in the prefervation of the game, by having in general the moft extenfive range to purfue it in, *viz.* upon their own eftates and waftes. And I conceive the 22 & 23 Car. II. c. 25. is the firft inftance either in our ftatutes, reports, or law treatifes, in which lords of manors are diftinguifhed from other land-owners with regard to the game.

UPON

UPON the whole it appears, that the king, by his prerogative, and ſuch perſons as have, under his authority, the royal franchiſes of chaſe, park, free warren, or free fiſhery, are the *only* perſons who may acquire any property, however fugitive and tranſitory, in theſe animals *ferae naturae*, while living; which is ſaid to be veſted in them, as was obſerved in a former chapter, *propter privilegium* (10). And it muſt alſo

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(10) The learned Judge has frequently, and even zealouſly, inculcated the poſition that the common law has *veſted the ſole property of all the game in England in the king alone*, and of conſequence that no man, let his rank and fortune be what they may, is qualified to kill game, or is exempt from the original penalties, unleſs he poſſeſſes ſome peculiar privilege derived from the king. This doctrine, enforced by ſo celebrated an author, apparently the reſult of mature deliberation, and which has been ſo long acquieſced in, the Editor ſhould have queſtioned with diffidence, if he had not been fully perſuaded that it was unſupported by any prior authority, and that the authorities to the contrary were numerous and irreſiſtible.

The learned Judge himſelf admits, that this is a novel doctrine to ſuch as call themſelves qualified ſportſmen; yet he has referred to no preceding authority whatever in any part of the Commentaries; but in p. 415. he has deduced this doctrine from two general principles, *viz. that the king is the ultimate proprietor of all the lands in the kingdom, and therefore he has the right of the univerſal ſoil to enter thereon*, and *to chaſe and take ſuch creatures at his pleaſure*. From the king's right to the univerſal ſoil, it is not evident why he ſhould have a better right to take ſuch creatures than to take any other production of that ſoil.

And even if the king's majeſty ſhould have a right to enter all the lands of the kingdom in purſuit of game, this affords no inference that the land-owner may not enjoy this right concurrently with the king. But although no complaint can perhaps be made againſt the king for entering the lands of his ſubjects, it has been determined that this power cannot be given to his foreſters and ſervants in a caſe in Keilway, which I ſhall preſently have occaſion to take notice of.

The other general principle relied upon by the learned Commentator is, *another maxim of the common law, which he ſays he has frequently*

be remembered, that ſuch perſons as may thus lawfully hunt, fiſh, or fowl, *ratione privilegii*, have (as has been ſaid) only

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frequently cited and illuſtrated, that theſe animals are bona vacantia, *and having no other owner, belong to the king by his prerogative.* It has been determined, that fiſh, if not confined as in a trunk, cannot be called *bona et catalla*; and ſo game till it is taken is every where ſaid to be *nullius in bonis*. But I am inclined to think that the very reverſe of the maxim is true, and that *bona vacantia* belong to the firſt occupant or fortunate finder, except in thoſe inſtances particularly ſpecified by the law, and in which they are expreſsly given to the king. See 1 vol. 299. n. 12. A perſon might have acquired by occupancy, even in the laſt century, an eſtate in real property. See p. 258, *ante*. If a pearl ſhould be found in an oyſter, no lawyer I think would ſay, that it was the property of the king. If all wild animals had belonged to the crown, it would have been ſuperfluous to have ſpecified whales, ſturgeons, and ſwans. Lord Coke tells us, that "a ſwan is a royal fowl; and all "thoſe the property whereof is not known, do belong to the king "by his prerogative: and ſo whales and ſturgeons are royal fiſh, "and belong to the king by his prerogative:" Caſe of ſwans, 7 *Co.* 16. "And the king may grant wild ſwans unmarked." *Ib.* 18. But theſe are the only animals which our law has conferred this honour upon.

It is true that our kings, prior to the *carta de foreſta*, claimed and exerciſed the prerogative of making foreſts wherever they pleaſed over the grounds of their ſubjects: within the limits of theſe foreſts certain wild animals were preſerved, by ſevere laws, for the recreation of the ſovereign. A diſtrict thus bounded at the king's pleaſure might have been granted by the king to any of his ſubjects who enjoyed the excluſive privilege either of a foreſt, chaſe, park, or free warren, according to the extent of the juriſdiction and powers conferred by the royal grant; p. 38, *ante*, n. 17. But beyond the boundaries of theſe privileged places neither the king nor any of his grantees claimed a property in the game: for, according to the law of king Canute, *quilibet homo dignus venatione ſua, in ſylva, et in agris ſibi propriis, et in dominio ſuo*; which law Manwood declares was confirmed by many ſucceeding kings. *Tit. For. pl.* 3. If this were ſo, it cannot be correct what the learned Commentator has advanced, that *upon the Norman conqueſt a new doctrine*

a qualified property in these animals: it not being absolute or permanent, but lasting only so long as the creatures remain

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doctrine took place. By the *carta de foresta* all the new-made forests were disafforested and thrown open again; but besides the creation of new forests by the Norman kings, they had also made great additions and encroachments to the antient Saxon forests; these encroachments were called *purlieus*, and as these were the same grievance to the owners of the land as the new forests, they also were disafforested, but with this distinction, that as the grievance extended only to the land-owner, he was allowed to enjoy his lands in as full a manner as he had done before the encroachment; but they still continued with respect to the rest of the world under the forest law jurisdiction. Hence it followed as a consequence, that the owner of a purlieu might hunt and kill game within the limits of the purlieu, as any other man might have done in his own grounds: and the authorities of lord Coke and Manwood concur, if deer come out of the forest into the purlieu, the purlieu-man may hunt and kill them, provided he does it fairly and without *forestalling*. And this distinction is made; if a stag can recover the *filum forestæ*, the border of the forest, before the purlieu-man's dogs fasten upon him, he then belongs to the king or to the owner of the forest, and the purlieu-man must call his dogs back; but if they fasten upon him before he gains the forest, and he drags them into it, he belongs to the owner of the purlieu, who may enter the forest and carry him away. 4 *Inst.* 303. *Manw. Purlieu.* This alone is decisive, but there are various authorities to the same effect. In the year-book 12 Hen. VIII. fo. 10. it is held, if a man drive a stag out of a forest and kill him, he shall gain no property in him, because he shall derive no advantage from his own wrongful act; yet if the stag comes of himself beyond the limits of the forest, then any one (if qualified) may kill and take him, for they are animals *feræ naturæ, et nullius in bonis*; and the maxim is *capiat qui capere potest*, i. e. catch that catch can.

That the king has no property in deer or other game, when they are out of a forest, was determined also in a case reported by Keilway, 30, and copied by Manwood, 202. In that case an action of trespass was brought for entering the plaintiff's close; the defendant pleaded, that the place in which the trespass was supposed to be committed was adjoining to the king's forest, and that the plaintiff

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within the limits of ſuch reſpective franchiſe or liberty, and ceaſing the inſtant they voluntarily paſs out of it. It is held

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was bound to impale the ſaid foreſt, and that for want of paling four deer eſcaped out of the foreſt into the plaintiff's land, and that he the defendant entered by the command of the foreſter to drive them back to the foreſt. The court held that this plea was not good; "for though the plaintiff was in fault for not paling, yet it "was not lawful for the foreſter or any perſon to drive the deer "out of the ground, or to take them; and the reaſon was, "*becauſe the king had no property in them*; and this was different "from the caſe of tame cattle, where the property ſtill remains "in the owner though they are out of his ground, for which reaſon "he may retake them wherever he finds them; but it is not ſo "when the beaſts are wild."

The learned Judge frequently intimates that no perſon is exempt from the original penalties; but I am inclined to think that no authority whatever can be found that any penalties were ever inflicted for killing game out of privileged grounds, except thoſe which have been introduced by modern game laws, or the qualification acts. Lord Coke reports that the court held in the caſe of monopolies, 11 *Co.* 87, that "it is true that none can make a "park, chaſe, or warren, without the king's licence, for that is "*quodam modo* to appropriate thoſe creatures, which are *feræ* "*naturæ et nullius in bonis*, to himſelf, and to reſtrain them of "their natural liberty, which he cannot do without the king's "licence; but for hunting, hawking, *&c.* which are matters of "paſtime, pleaſure, and recreation, there needs no licence, but "every one may in his own land uſe them at his pleaſure *without* "*any reſtraint to be made unleſs by parliament*, as appears by the "ſtatutes of 11 Hen. VII. c. 17. 23 Eliz. c. 10. and 3 Jac. I. "c. 13."

Theſe authorities are alſo recognized and confirmed in *Bro. Abr. tit. Propertie*, and in Hale's Commentary to *F. N. B.* 197.

The following may ſerve as a ſpecimen of the authorities collected by Brooke: *quant beaſtes ſavages le roye aler hors del forreſt, le property eſt hors del roy*; and again, *filz ſount hors del parke capienti conceditur.*

In a great caſe which was brought in 1791 from the courts of Scotland before the houſe of lords, the queſtion was, whether by the

indeed, that if a man ſtarts any game within his own grounds, and follows into another's, and kills it there, the property remains in himſelf [c]. And this is grounded on reaſon and natural juſtice [d]: for the property conſiſts in the poſſeſſion; which poſſeſſion commences by the finding it in his own liberty, and is continued by the immediate purſuit. And ſo, if a ſtranger ſtarts game in one man's chaſe or free warren, and hunts it into another liberty, the property continues in the owner of the chaſe or warren; this property ariſing from privilege [e], and not being changed by the act of a mere ſtranger. Or if a man ſtarts game on another's private grounds and kills it there, the property belongs to him in whoſe ground it was killed, becauſe it was alſo ſtarted there [f]; the property ariſing *ratione ſoli.* Whereas if, after being ſtarted there, it is killed in the grounds of a third perſon, the property belongs not to the owner of the firſt

c 11 Mod. 75.

d Puff. L. N. l. 4. c. 6.

e Lord Raym. 251.

f *Ibid.*

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the law of Scotland the proprietor of an eſtate has a right to monopolize the game upon that eſtate, for the uſe of himſelf and particular friends, authorized by his licence, and to exclude all gentlemen, legally qualified, from following that amuſement over his waſte and other grounds, not ſpecially protected by any particular ſtatute? The printed caſes of the appellant and reſpondent contain much curious learning upon the Scotch game-laws: but no idea was ſuggeſted that the game in Scotland belonged to the king. For the appellant, who inſiſted that he had a right to enter as a ſportſman upon the reſpondent's eſtate, the authority of preſident Balfour in his Practics, was chiefly relied upon; *viz.* "It is "leiſome and permitted to all men to chaiſe hares, foxes, and all "other beiſtis, beand without forreſtis, warrenis, parkis, or "wardis." But the judgment of the lords being for the reſpondent, this permiſſion of courſe muſt be confined to a man's own eſtate. *Livingſtone, eſq. appellant,* v. *lord Breadalbane, reſpondent.* This is preciſely the ſame as the law of England; for neither a lord of a manor, nor his gamekeeper, can go into any part of the manor, which is not the lord's own eſtate or waſte, without being a treſpaſſer like any other perſon.

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ground, becauſe the property is local; nor yet to the owner of the ſecond, becauſe it was not ſtarted in his ſoil; but it veſts in the perſon who ſtarted and killed it [g], though guilty of a treſpaſs againſt both the owners (11).

[420] III. I PROCEED now to a third method, whereby a title to goods and chattels may be acquired and loſt, *viz.* by *forfeiture;* as a puniſhment for ſome crime or miſdemeſnor in the party forfeiting, and as a compenſation for the offence and injury committed againſt him to whom they are forfeited. Of forfeitures, conſidered as the means whereby *real* property might be loſt and acquired, we treated in a former chapter [h]. It remains therefore in this place only to mention by what means, or for what offences, goods and chattels become liable to forfeiture.

IN the variety of penal laws with which the ſubject is at preſent encumbered, it were a tedious and impracticable taſk to reckon up the various forfeitures, inflicted by ſpecial ſtatutes, for particular crimes and miſdemeſnors: ſome of which are *mala in ſe*, or offences againſt the divine law, either natural or revealed; but by far the greateſt part are *mala prohibita*, or ſuch as derive their guilt merely from their prohibition by the laws of the land: ſuch as is the forfeiture of 40*s.* per month by the ſtatute 5 Eliz. c. 4. for exerciſing a trade without having ſerved ſeven years as an apprentice thereto; and the forfeiture of 10*l.* by 9 Ann. c. 23. for printing an almanack without a ſtamp. I ſhall therefore confine myſelf to thoſe offences only; by which *all* the goods and chattels of the offender are forfeited: referring the ſtudent for ſuch, where pecuniary mulcts of different quantities are inflicted, to their ſeveral proper heads, under which very

g Farr. 18. Lord. Raym. *ibid.*

h See page 267.

(11) Theſe diſtinctions never could have exiſted, if the doctrine had been true that all the game was the property of the king; for in that caſe the maxim, *In æquali jure potior eſt conditio poſſidentis*, muſt have prevailed.

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many of them have been or will be mentioned; or elſe to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as moſt of theſe forfeitures belong to the crown, they may ſeem as if they ought to have been referred to the preceding method of acquiring perſonal property, namely, by prerogative. But as, in the inſtance of partial forfeitures, a moiety often goes to the informer, the poor, or ſometimes to other perſons; and as one total forfeiture, namely that by a bankrupt who is guilty of felony by concealing his effects, accrues entirely to his creditors, I have there- [421]
fore made it a diſtinct head of transferring property.

Goods and chattels then are totally forfeited by conviction of *high treaſon* or *miſpriſion* of treaſon; of *petit treaſon*; of *felony* in general, and particularly of *felony de ſe*, and of *manſlaughter*; nay even by conviction of *excuſable homicide*[i]; by *outlawry* for treaſon or felony; by conviction of *petit larceny*; by *flight* in treaſon or felony, even though the party be acquitted of the fact; by *ſtanding mute*, when arraigned of felony; by *drawing a weapon on a judge*, or *ſtriking* any one *in the preſence of the king's courts*; by *praemunire*; by *pretended propheсies*, upon a ſecond conviction; by *owling*; by the *reſiding abroad* of artificers; and by *challenging to fight* on account of money won at gaming. All theſe offences, as will more fully appear in the fourth book of theſe commentaries, induce a total forfeiture of goods and chattels.

And this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of real property. For chattels are of ſo vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the caſe of landed eſtates: and part, if not the whole of them, muſt be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the intereſt of the crown, is made void by ſtatute 13 Eliz. c. 5.

i Co. Litt. 391. 2 Inſt. 316. 3 Inſt. 320.

CHAPTER THE TWENTY-EIGHTH.

OF TITLE BY CUSTOM.

A FOURTH method of acquiring property in things perſonal, or chattels, is by *cuſtom:* whereby a right veſts in ſome particular perſons, either by the local uſage of ſome particular place, or by the almoſt general and univerſal uſage of the kingdom. It were endleſs, ſhould I attempt to enumerate all the ſeveral kinds of ſpecial cuſtoms, which may entitle a man to a chattel intereſt in different parts of the kingdom: I ſhall therefore content myſelf with making ſome obſervations on three ſorts of cuſtomary intereſts, which obtain pretty generally throughout moſt parts of the nation, and are therefore of more univerſal concern; viz. *heriots, mortuaries,* and *heir-looms.*

1. HERIOTS, which were ſlightly touched upon in a former chapter [a], are uſually divided into two ſorts, heriot-*ſervice*, and heriot-*cuſtom*. The former are ſuch as are due upon a ſpecial reſervation in a grant or leaſe of lands, and therefore amount to little more than a mere rent [b]: the latter ariſe upon no ſpecial reſervation whatſoever, but depend merely upon immemorial uſage and cuſtom [c]. Of theſe therefore we are here principally to ſpeak: and they are defined to be a cuſtomary tribute of goods and chattels, payable to the lord of the fee on the deceaſe of the owner of the land.

[a] pag. 97.
[b] 2 Saund. 166.
[c] Co. Cop. § 24.

THE

THE firſt eſtabliſhment, if not introduction, of compulſory heriots into England, was by the Danes: and we find in the laws of king Canute[d] the ſeveral *heregeates* or heriots ſpecified, which were then exacted by the king on the death of divers of his ſubjects, according to their reſpective dignities; from the higheſt *eorle* down to the moſt inferior *thegne* or landholder. Theſe, for the moſt part, conſiſted in arms, horſes, and habiliments of war; which the word itſelf, according to Sir Henry Spelman[e], ſignifies. Theſe were delivered up to the ſovereign on the death of the vaſal, who could no longer uſe them, to be put into other hands for the ſervice and defence of the country. And upon the plan of this Daniſh eſtabliſhment did William the conqueror faſhion his law of reliefs, as was formerly obſerved[f]; when he aſcertained the preciſe relief to be taken of every tenant in chivalry, and, contrary to the feodal cuſtom and the uſage of his own duchy of Normandy, required arms and implements of war to be paid inſtead of money[g].

THE Daniſh compulſive heriots, being thus tranſmuted into reliefs, underwent the ſame ſeveral viciſſitudes as the feodal tenures, and in ſocage eſtates do frequently remain to this day in the ſhape of a double rent payable at the death of the tenant: the heriots which now continue among us, and preſerve that name, ſeeming rather to be of Saxon parentage, and at firſt to have been merely diſcretionary[h]. Theſe are now for the moſt part confined to copyhold tenures, and are due by cuſtom only, which is the life of all eſtates by copy; and perhaps are the only inſtance where cuſtom has favoured the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowlegement of his having been raiſed a degree above villenage, when all his goods and chattels were quite at the mercy of the lord; and cuſtom, which has on the one hand confirmed the tenant's intereſt in excluſion of the

[d] c. 69.
[e] of feuds. c. 18.
[f] page 65.
[g] *LL. Guil. Conq.* c. 22, 23, 24.
[h] Lambard. Peramb. of Kent. 492.

lord's will, has on the other hand eſtabliſhed this diſcretional piece of gratitude into a permanent duty. An heriot may alſo appertain to free land, that is held by ſervice and ſuit of court; in which caſe it is moſt commonly a copyhold enfranchiſed, whereupon the heriot is ſtill due by cuſtom. Bracton [i] ſpeaks of heriots as frequently due on the death of both ſpecies of tenants: "*eſt quidem alia praeſtatio quae nomi-*" *natur heriettum; ubi tenens, liber vel ſervus, in morte ſua* "*dominum ſuum, de quo tenuerit, reſpicit de meliori averio ſuo,* "*vel de ſecundo meliori, ſecundum diverſam locorum conſuetudi-* "*nem.*" And this he adds, "*magis fit de gratia quam de* "*jure;*" in which Fleta [k] and Britton [l] agree: thereby plainly intimating the original of this cuſtom to have been merely voluntary, as a legacy from the tenant; though now the immemorial uſage has eſtabliſhed it as of right in the lord.

THIS heriot it ſometimes the beſt live beaſt, or *averium*, which the tenant dies poſſeſſed of, (which is particularly denominated the villein's relief in the twenty-ninth law of king William the conqueror) ſometimes the beſt inanimate good, under which a jewel or piece of plate may be included: but it is always a *perſonal* chattel, which, immediately on the death of the tenant who was the owner of it, being aſcertained by the option of the lord [m], becomes veſted in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant muſt be the owner of it, elſe it cannot be due; and therefore on the death of a feme-covert no heriot can be taken; for ſhe can have no ownerſhip in things perſonal [n]. In ſome places there is a cuſtomary compoſition in money, as ten or twenty ſhillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indiſputably ancient cuſtom: but a new compoſition of this ſort will not bind the repreſentatives of either party; for that amounts to the creation of a new cuſtom, which is now impoſſible [o].

[i] *l.* 2. *c.* 36. § 9.
[k] *l.* 3. *c.* 18.
[l] *c.* 69.
[m] Hob. 60.
[n] Keilw. 84. 4 Leon. 239.
[o] Co. Cop. § 31.

2. MOR-

2. MORTUARIES are a ſort of eccleſiaſtical heriots, being a cuſtomary gift claimed by and due to the miniſter in very many pariſhes on the death of his pariſhioners. They ſeem originally to have been, like lay heriots, only a voluntary bequeſt to the church; being intended, as Lyndewode informs us from a conſtitution of archbiſhop Langham, as a kind of expiation and amends to the clergy for the perſonal tithes, and other eccleſiaſtical duties, which the laity in their life-time might have neglected or forgotten to pay. For this purpoſe, *after* [p] the lord's heriot or beſt good was taken out, the ſecond beſt chattel was reſerved to the church as a mortuary: "*ſi decedens plura habuerit animalia, optimo cui de jure* "*fuerit debitum reſervato, eccleſiae ſuae ſine dolo, fraude, ſeu* "*contradictione qualibet, pro recompenſatione ſubtractionis deci-* "*marum perſonalium, necnon et oblationum, ſecundum melius ani-* "*mal reſervetur, poſt obitum, pro ſalute animae ſuae* [q]." And therefore in the laws of king Canute [r] this mortuary is called ſoul-ſcot (ꞅaplꞅceaꞇ) or *ſymbolum animae*. And, in purſuance of the ſame principle, by the laws of Venice, where no perſonal tithes have been paid during the life of the party, they are paid at his death out of his merchandize, jewels, and other moveables [s]. So alſo, by a ſimilar policy, in France, every man that died without bequeathing a part of his eſtate to the church, which was called *dying without confeſſion*, was formerly deprived of chriſtian burial: or, if he died inteſtate, the relations of the deceaſed, jointly with the biſhop, named proper arbitrators to determine what he ought to have given to the church, in caſe he had made a will. But the parliament, in 1409, redreſſed this grievance [t].

IT was antiently uſual in this kingdom to bring the mortuary to church along with the corpſe when it came to be buried; and thence [u] it is ſometimes called a *corſe-preſent*: a term which beſpeaks it to have been once a voluntary donation. However in Bracton's time, ſo early as Henry III. we

p Co. Litt. 185.
q *Provinc. l.* 1. *tit.* 3.
r c. 13.
s Panormitan. *ad Decretal. l.* 3. *t.* 20. *c.* 32.
t Sp. L. b. 28. c. 41.
u Selden. Hiſt. of tithes. c. 10.

find it rivetted into an eſtabliſhed cuſtom: inſomuch that the bequeſts of heriots and mortuaries were held to be neceſſary ingredients in every teſtament of chattels. "*Imprimis autem* "*debet quilibet, qui teſtamentum fecerit, dominum ſuum de me-*"*liori re quam habuerit recognoſcere; et poſtea eccleſiam de alia* "*meliori:*" the lord muſt have the beſt good left him as an heriot; and the church the ſecond beſt as a mortuary. But yet this cuſtom was different in different places: "*in qui-*"*buſdam locis habet eccleſia melius animal de conſuetudine; in qui-*"*buſdam ſecundum, vel tertium melius; et in quibuſdam nihil:* "*et ideo conſideranda eſt conſuetudo loci*[w]." This cuſtom ſtill varies in different places, not only as the mortuary to be paid, but the perſon to whom it is payable. In Wales a mortuary or corſe-preſent was due upon the death of every clergyman to the biſhop of the dioceſe; till aboliſhed, upon a recompenſe given to the biſhop, by the ſtatute 12 Ann. ſt. 2. c. 6. And in the archdeaconry of Cheſter a cuſtom alſo prevailed, that the biſhop, who is alſo archdeacon, ſhould have, at the death of every clergyman dying therein, his beſt horſe or mare, bridle, ſaddle, and ſpurs, his beſt gown or cloak, hat, upper garment under his gown, and tippet, and alſo his beſt ſignet or ring[x]. But by ſtatute 28 Geo. II. c. 6. this mortuary is directed to ceaſe, and the act has ſettled upon the biſhop an equivalent in it's room. The king's claim to many goods, on the death of all prelates in England, ſeems to be of the ſame nature: though ſir Edward Coke[y] apprehends, that this is *a duty due upon death* and not *a mortuary*: a diſtinction which ſeems to be without a difference. For not only the king's eccleſiaſtical character, as ſupreme ordinary, but alſo the ſpecies of the goods claimed, which bear ſo near a reſemblance to thoſe in the archdeaconry of Cheſter, which was an acknowleged mortuary, puts the matter out of diſpute. The king, according to the record vouched by ſir Edward Coke, is entitled to ſix things; the biſhop's beſt horſe or palfrey, with his furniture: his cloak, or gown, and tippet: his cup, and cover: his baſon and ewer:

w Bracton. *l.* 2. *c.* 26. Flet. *l.* 2. *c.* 57.
x Cro. Car. 237.
y 2 Inſt. 491.

his gold ring: and laſtly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter[z].

THIS variety of cuſtoms, with regard to mortuaries, giving frequently a handle to exactions on the one ſide, and frauds or expenſive litigations on the other; it was thought proper by ſtatute 21 Hen. VIII. c. 6. to reduce them to ſome kind of certainty. For this purpoſe it is enacted, that all mortuaries, or corſe-preſents to parſons of any pariſh, ſhall be taken in the following manner; unleſs where by cuſtom leſs or none at all is due: *viz.* for every perſon who does not leave goods to the value of ten marks, nothing: for every perſon who leaves goods to the value of ten marks and under thirty pounds, 3*s.* 4*d.* if above thirty pounds, and under forty pounds, 6*s.* 8*d.* if above forty pounds, of what value ſoever they may be, 10*s.* an no more. And no mortuary ſhall throughout the kingdom be paid for the death of any feme-covert; nor for any child; nor for any one of full age, that is not a houſekeeper; nor for any wayfaring man; but ſuch wayfaring man's mortuary ſhall be paid in the pariſh to which he belongs. And upon this ſtatute ſtands the law of mortuaries to this day.

3. HEIR-LOOMS are ſuch goods and perſonal chattels, as, contrary to the nature of chattels, ſhall go by ſpecial cuſtom to the heir along with the inheritance, and not to the executor of the laſt proprietor. The termination, *loom*, is of Saxon original; in which language it ſignifies a limb or member[a]; ſo that an heir-loom is nothing elſe, but a limb or member of the inheritance. They are generally ſuch things as cannot be taken away without damaging or diſmembering the freehold: otherwiſe the general rule is, that no chattel intereſt whatſoever ſhall go to the heir, notwithſtanding it be expreſsly limited to a man and his heirs, but ſhall veſt in the executor[b] (1). But deer in a real authorized park, fiſhes in a

[z] pag. 413. [a] Spelm. *Gloſſ.* 277. [b] Co. Litt. 388.

(1) Or if any chattel be given to a man and the heirs of his body, he takes the entire and abſolute intereſt in it. There have been

pond, doves in a dove-houſe, *&c.* though in themſelves perſonal chattels, yet they are ſo annexed to and ſo neceſſary to the well-being of the inheritance, that they ſhall accompany the land wherever it veſts, by either deſcent or purchaſe [c]. For this reaſon alſo I apprehend it is, that the antient jewels of the crown are held to be heir-looms [d]; for they are neceſſary to maintain the ſtate, and ſupport the dignity, of the ſovereign for the time being. Charters likewiſe, and deeds, court rolls, and other evidences of the land, together with the cheſts in which they are contained, ſhall paſs together with the land to the heir, in the nature of heir-looms, and ſhall not go to the executor [e]. By ſpecial cuſtom alſo, in ſome places, carriages, utenſils, and other houſehold implements, may be heir-looms [f]; but ſuch cuſtom muſt be ſtrictly proved. On the other hand, by almoſt general cuſtom, whatever is ſtrongly affixed to the freehold or inheritance, and cannot be ſevered from thence without violence or damage, "*quod ab aedibus non facile revellitur* [g]," is become a member of the inheritance, and ſhall thereupon paſs to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like [h] (2). A very ſimilar notion to which prevails in the duchy of Brabant; where they rank certain things moveable among thoſe of the immoveable

[c] Co. Litt. 8.

[d] *Ibid.* 18.

[e] Bro. *Abr. tit. chatteles.* 18.

[f] Co. Litt. 18. 185.

[g] Spelm. *Gloſſ.* 277.

[h] 12 Mod. 520.

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been many fruitleſs attempts to make pictures, plate, books, and houſehold furniture, deſcend to the heir with a family manſion. Where they are left to be enjoyed as heir-looms by the perſons who ſhall reſpectively be in poſſeſſion of a certain houſe, or to deſcend as heir-looms as far as courts of law and equity will admit, the abſolute intereſt of them, ſubject to the life-intereſts of thoſe who have life-eſtates in the real property, will veſt in that perſon who is entitled to the firſt eſtate-tail or eſtate of inheritance, and upon his death that intereſt will paſs to his perſonal repreſentative. 1 *Bro.* 274. 3 *Bro.* 101.

(2) See p. 281, n. 10, *ante.*

kind,

kind, calling them by a very particular appellation, *praedia volantia*, or volatile eſtates: ſuch as beds, tables, and other heavy implements of furniture, which (as an author of their own obſerves) "*dignitatem iſtam nacta ſunt, ut villis, ſylvis,* "*et aedibus, aliiſque praediis, comparentur; quod ſolidiora mo-* "*bilia ipſis aedibus ex deſtinatione patrisfamilias cohaerere vi-* "*deantur, et pro parte ipſarum aedium aeſtimentur* [i]."

OTHER perſonal chattels there are, which alſo deſcend to the heir in the nature of heir-looms, as a monument or tomb-ſtone in a church, or the coat-armor of his anceſtor there hung up, with the pennons and other enſigns of honor, ſuit-ed to his degree. In this caſe, albeit the freehold of the church is in the parſon, and theſe are annexed to that free- [429] hold, yet cannot the parſon or any other take them away or deface them, but is liable to an action from the heir [k]. Pews in the church are ſomewhat of the ſame nature, which may deſcend by cuſtom immemorial (without any eccleſiaſtical con-currence) from the anceſtor to the heir [l] (3). But though the heir has a property in the monuments and eſcutcheons of his anceſtors, yet he has none in their bodies or aſhes; nor can he bring any civil action againſt ſuch as indecently at leaſt, if not impiouſly, violate and diſturb their remains, when dead and buried. The parſon indeed, who has the freehold of the

i Stockmans *de jure devolutionis. c.* 3. § 16.

k 12 Rep. 105. Co. Litt. 18.

l 3 Inſt. 202. 12 Rep. 105.

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(3) The right to ſit in a particular pew in a church ariſes either from preſcription as appurtenant to a meſſuage, or from a faculty or grant from the ordinary, for he has the diſpoſition of all pews which are not claimed by preſcription. *Gibſ. Cod.* 221.

In an action upon the caſe for a diſturbance of the enjoyment of a pew, if the plaintiff claims it by preſcription, he muſt ſtate it in the declaration as appurtenant to a meſſuage in the pariſh. This preſcription may be ſupported by an enjoyment for thirty-ſix years, and perhaps any time above twenty years. 1 *T. R.* 428. In ſuch an action againſt the ordinary, the plaintiff muſt allege and prove repairs of the pew. 1 *Wilſ.* 326.

ſoil, may bring an action of treſpaſs againſt ſuch as dig and diſturb it: and, if any one in taking up a dead body ſteals the ſhroud or other apparel, it will be felony[m]; for the property thereof remains in the executor, or whoever was at the charge of the funeral (4).

BUT to return to heir-looms: theſe, though they be mere chattels, yet cannot be deviſed away from the heir by will; but ſuch a deviſe is void[n], even by a tenant in fee-ſimple. For, though the owner might during his life have ſold or diſpoſed of them, as he might of the timber of the eſtate, ſince, as the inheritance was his own, he might mangle or diſmember it as he pleaſed; yet, they being at his death inſtantly veſted in the heir, the deviſe (which is ſubſequent, and not to take effect till *after* his death) ſhall be poſtponed to the cuſtom, whereby they have already deſcended.

[m] 3 Inſt. 110. 12 Rep. 113. 1 Hal. P. C. 515. [n] Co. Litt. 185.

(4) It has been determined, that ſtealing dead bodies, though for the improvement of the ſcience of anatomy, is an indictable offence as a miſdemeanour; it being a practice contrary to common decency, and ſhocking to the general ſentiments and feelings of mankind. 1 *T. R.* 733.

CHAPTER THE TWENTY-NINTH.

OF TITLE BY SUCCESSION, MARRIAGE AND JUDGMENT.

IN the prefent chapter we fhall take into confideration three other fpecies of title to goods and chattels.

V. THE fifth method therefore of gaining a property in chattels, either perfonal or real, is by *fucceffion:* which is, in ftrictnefs of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, mafter and fellows, and the like; in which one fet of men may, by fucceeding another fet, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reafon whereof is, becaufe in judgment of law a corporation never dies: and therefore the predeceffors, who lived a century ago, and their fucceffors now in being, are one and the fame body corporate [a]. Which identity is a property fo inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in fucceffion by fuch a body, that fucceffion need not be expreffed: but the law will of itfelf imply it. So that a gift to fuch a corporation, either of lands or of chattels, without naming their fucceffors, vefts an abfolute property in them fo long as the corporation fubfifts [b]. And thus a leafe for years, an obliga-

[a] 4 Rep. 65.

[b] Bro. *Abr. t. eftates.* 90. Cro. Eliz. 464.

tion,

tion, a jewel, a flock of ſheep, or other chattel intereſt, will veſt in the ſucceſſors, by ſucceſſion, as well as in the identical members, to whom it was originally given.

BUT, with regard to ſole corporations, a conſiderable diſtinction muſt be made. For if ſuch ſole corporation be the repreſentative of a number of perſons; as the maſter of an hoſpital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who repreſented the whole convent; or the dean of ſome antient cathedral, who ſtands in the place of, and repreſents in his corporate capacity, the chapter; ſuch ſole corporations as theſe have in this reſpect the ſame powers, as corporations aggregate have, to take perſonal property or chattels in ſucceſſion. And therefore a bond to ſuch a maſter, abbot, or dean, and his ſucceſſors, is good in law; and the ſucceſſor ſhall have the advantage of it, for the benefit of the aggregate ſociety, of which he is in law the repreſentative [c]. Whereas in the caſe of ſole corporations, which repreſent no others but themſelves, as biſhops, parſons, and the like, no chattel intereſt can regularly go in ſucceſſion: and therefore, if a leaſe for years be made to the biſhop of Oxford and his ſucceſſors, in ſuch caſe his executors or adminiſtrators, and not his ſucceſſors, ſhall have it [d]. For the word *ſucceſſors*, when applied to a perſon in his political capacity, is equivalent to the word *heirs* in his natural; and as ſuch a leaſe for years, if made to John and his heirs, would not veſt in his heirs but his executors; ſo if it be made to John biſhop of Oxford and his ſucceſſors, who are the heirs of his body politic, it ſhall ſtill veſt in his executors and not in ſuch his ſucceſſors. The reaſon of this is obvious: for, beſides that the law looks upon goods and chattels as of too low and periſhable a nature to be limited either to heirs, or ſuch ſucceſſors as are equivalent to heirs; it would alſo follow, that if any ſuch chattel intereſt (granted to a ſole corporation and his ſucceſſors) were allowed to deſcend to ſuch ſucceſſor, the property thereof muſt be in abeyance from the

c Dyer 48. Cro. Eliz. 464.

d Co. Litt. 46.

death

death of the preſent owner until the ſucceſſor be appointed: and this is contrary to the nature of a chattel intereſt, which can never be in abeyance or without an owner[e]; but a man's right therein, when once ſuſpended, is gone for ever. This is not the caſe in corporations aggregate, where the right is never in ſuſpence; nor in the other ſole corporations before-mentioned, who are rather to be conſidered as heads of an aggregate body, than ſubſiſting merely in their own right: the chattel intereſt therefore, in ſuch a caſe, is really and ſubſtantially veſted in the hoſpital, convent, chapter, or other aggregate body; though the head is the viſible perſon in whoſe name every act is carried on, and in whom every intereſt is therefore ſaid (in point of form) to veſt. But the general rule, with regard to corporations merely ſole, is this, that no chattel can go to or be acquired by them in right of ſucceſſion[f].

Yet to this rule there are two exceptions. One in the caſe of the king, in whom a chattel may veſt by a grant of it formerly made to a preceding king and his ſucceſſors[g]. The other exception is, where, by a *particular* cuſtom, ſome *particular* corporations ſole have acquired a power of taking *particular* chattel intereſts in ſucceſſion. And this cuſtom, being againſt the general tenor of the common law, muſt be ſtrictly interpreted, and not extended to any other chattel intereſts than ſuch immemorial uſage will ſtrictly warrant. Thus the chamberlain of London, who is a corporation ſole, may by the cuſtom of London take *bonds* and *recognizances* to himſelf and his ſucceſſors, for the benefit of the orphan's fund[h]: but it will not follow from thence, that he has a capacity to take a *leaſe for years* to himſelf and his ſucceſſors for the ſame purpoſe; for the cuſtom extends not to that: nor that he may take a *bond* to himſelf and his ſucceſſors, for any other purpoſe than the benefit of the orphan's fund; for that alſo is not warranted by the cuſtom. Wherefore, upon the whole, we may cloſe this head with laying down this ge-

[e] Brownl. 132.

[f] Co. Litt. 46.

[g] *Ibid.* 90.

[h] 4 Rep. 65. Cro. Eliz. 682.

neral

neral rule; that ſuch right of ſucceſſion to chattels is univerſally inherent by the common law in all aggregate corporations, in the king, and in ſuch ſingle corporations as repreſent a number of perſons; and may, by ſpecial cuſtom, belong to certain other ſole corporations for ſome particular purpoſes: although, generally, in ſole corporations no ſuch right can exiſt.

VI. A SIXTH method of acquiring property in goods and chattels is by *marriage*; whereby thoſe chattels, which belonged formerly to the wife, are by act of law veſted in the huſband, with the ſame degree of property and with the ſame powers, as the wife, when ſole, had over them.

THIS depends entirely on the notion of an unity of perſon between the huſband and wife; it being held that they are one perſon in law[i], ſo that the very being and exiſtence of the woman is ſuſpended during the coverture, or entirely merged or incorporated in that of the huſband. And hence it follows, that whatever perſonal property belonged to the wife, before marriage, is by marriage abſolutely veſted in the huſband. In a real eſtate, he only gains a title to the rents and profits during coverture: for that, depending upon feodal principles, remains entire to the wife after the death of her huſband, or to her heirs, if ſhe dies before him; unleſs by the birth of a child, he becomes tenant for life by the curteſy. But, in chattel intereſts, the ſole and abſolute property veſts in the huſband, to be diſpoſed of at his pleaſure, if he chuſes to take poſſeſſion of them: for, unleſs he reduces them to poſſeſſion, by exerciſing ſome act of ownerſhip upon them, no property veſts in him, but they ſhall remain to the wife, or to her repreſentatives, after the coverture is determined (1).

[i] See book I. c. 15.

(1) If he aſſigns her choſes in actions for a valuable conſideration in her lifetime, and ſhe ſurvives, ſhe is bound only to the amount of the conſideration, and the reſidue ſurvives to her. 1 *Atk.* 207. *Cox's P. Wms.* 380. But if the huſband before marriage makes a ſettle-

THERE is therefore a very confiderable difference in the acquifition of this fpecies of property by the hufband, according to the fubject-matter; *viz.* whether it be a chattel *real*, or a chattel *perfonal*: and, of chattels perfonal, whether it

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a fettlement upon the wife in confideration of the wife's fortune, the reprefentative of the hufband will be entitled to all her things in action: (3 *P. Wms.* 199.) but if it is in confideration of part of the eftate only, the refidue not reduced into poffeffion will furvive to the wife: and where there is a fettlement made equivalent to the wife's fortune, though no mention be made of her perfonal eftate, the hufband's reprefentative will be entitled to the whole. See *Mr. Butler's note to Co. Litt.* 352. where thefe diftinctions are clearly and fully collected. If the hufband cannot recover the things in action of his wife but by the affiftance of a court of equity, the court, upon the principle that he who feeks equity muft do equity, will not affift him in recovering the property, unlefs he either has made a previous provifion for her, or agrees to do it out of the eftate prayed for; or unlefs the wife appears perfonally in court, and confents to the property being given to him. 2 *Vef.* 669. But the court will not direct the fortune in all cafes to be paid to the hufband, though the wife appears to confent, where no previous provifion whatever is made upon her. 2 *Vef.* 579. Lord Thurlow has declared that he did not find it any where decided, that if the hufband makes an actual affignment by contract for a valuable confideration, the affignee fhould be bound to make any provifion for the wife out of the property affigned; but that a court of equity has much greater confideration for the affignment actually made by contract, than for an affignment by mere operation of law; for as to the latter, his lordfhip declared it to be his opinion, that when the equitable intereft of the wife was transferred to the creditor of the hufband by mere operation of law, (as in the cafe of an affignee under a commiffion of bankrupt,) he ftood exactly in the place of the hufband, and was fubject precifely to the fame equity in refpect of the wife. *Cox's P. Wms.* 459. But it is determined, the wife fhall have the fame relief, under a general affignment by the hufband of his eftate for the benefit of his creditors. 4 *Bro.* 139.

But if the wife's fortune is paid to the hufband, or he can receive it without applying to a court of equity, fuch a court can give no relief to the wife. 2 *Atk.* 420. *But. Co. Litt.* 351. 1 *Fonb. Tr. Eq.* 304.

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be in *poſſeſſion*, or in *action* only. A *chattel real* veſts in the huſband, not abſolutely, but *ſub modo*. As, in caſe of a leaſe for years, the huſband ſhall receive all the rents and profits of it, and may, if he pleaſes, ſell, ſurrender, or diſpoſe of it during the coverture[k]: if he be outlawed or attainted, it ſhall be forfeited to the king[l]; it is liable to execution for his debts[m]: and, if he ſurvives his wife, it is to all intents and purpoſes his own[n]. Yet, if he has made no diſpoſition thereof in his lifetime, and dies before his wife, he cannot diſpoſe of it by will[o]: for, the huſband having made no alteration in the property during his life, it never was tranſferred from the wife; but after his death ſhe ſhall remain in her antient poſſeſſion, and it ſhall not go to his executors. So it is alſo of chattels perſonal (or *choſes*) in *action*: as debts upon bond, contracts, and the like: theſe the huſband may have if he pleaſes; that is, if he reduces them into poſſeſſion by receiving or recovering them at law. And, upon ſuch receipt or recovery, they are abſolutely and entirely his own; and ſhall go to his executors or adminiſtrators, or as he ſhall bequeath them by will, and ſhall not reveſt in the wife. But, if he dies before he has recovered or reduced them into poſſeſſion, ſo that at his death they ſtill continue *choſes in action*, they ſhall ſurvive to the wife; for the huſband never exerted the power he had of obtaining an excluſive property in them[p]. And ſo, if an eſtray comes into the wife's franchiſe, and the huſband ſeiſes it, it is abſolutely his property: but if he dies without ſeiſing it, his executors are not now at liberty to ſeiſe it, but the wife or her heirs[q]; for the huſband never exerted the right he had, which right determined with the coverture. Thus, in both theſe ſpecies of property the law is the ſame, in caſe the wife ſurvives the huſband; but, in caſe the huſband ſurvives the wife, the law is very different with reſpect to *chattels real* and *choſes in action*: for he ſhall have
[435] the *chattel real* by ſurvivorſhip, but not the *choſe in action*[r]; except in the caſe of arrears of rent, due to the wife before

k Co. Litt. 46.
l Plowd. 263.
m Co. Litt. 351.
n *Ibid.* 300.
o Poph. 5. Co. Litt. 351.
p Co. Litt. 351.
q *Ibid.*
r 3 Mod. 186.

her

her coverture, which in cafe of her death are given to the hufband by ftatute 32 Hen. VIII. c. 37. And the reafon for the general law is this: that the hufband is in abfolute poffeffion of the *chattel real* during the coverture, by a kind of joint-tenancy with his wife; wherefore the law will not wreft it out of his hands, and give it to her reprefentatives; though, in cafe he had died firft, it would have furvived to the wife, unlefs he thought proper in his lifetime to alter the poffeffion. But a *chofe in action* fhall not furvive to him, becaufe he never was in poffeffion of it at all, during the coverture; and the only method he had to gain poffeffion of it, was by fuing in his wife's right: but as, after her death, he cannot (as hufband) bring an action in her right, becaufe they are no longer one and the fame perfon in law, therefore he can never (as fuch) recover the poffeffion. But he ftill will be entitled to be her adminiftrator; and may, in that capacity, recover fuch things in action as became due to her before or during the coverture (2).

THUS, and upon thefe reafons, ftands the law between hufband and wife, with regard to *chattels real* and *chofes in action*: but, as to *chattels perfonal* (or *chofes*) *in poffeffion*, which the wife hath in her own right, as ready money, jewels, houfehold goods, and the like, the hufband hath therein an immediate and abfolute property, devolved to him by the marriage, not only potentially but in fact, which never can again reveft in the wife or her reprefentatives[s].

AND, as the hufband may thus generally acquire a property in all the perfonal fubftance of the wife, fo in one particu-

[s] Co. Litt. 351.

(2) By 29 Car. II. c. 3. f. 25. the hufband fhall have adminiftration of all his wife's perfonal eftate, which he did not reduce into his poffeffion before her death, and fhall retain it to his own ufe: and if he dies before adminiftration is granted to him, or he has recovered his wife's property, the right to it paffes to his perfonal reprefentative, and not to the wife's next of kin. 1 *P. Wms.* 378. *But. Co. Litt.* 351.

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far inftance the wife may acquire a property in fome of her hufband's goods; which fhall remain to her after his death, and not go to his executors. Thefe are called her *paraphernalia*; [436] which is a term borrowed from the civil law [t], and is derived from the Greek language, fignifying fomething over and above her dower. Our law ufes it to fignify the apparel and ornaments of the wife, fuitable to her rank and degree; and therefore even the jewels of a peerefs, ufually worn by her, have been held to be *paraphernalia* [u]. Thefe fhe becomes entitled to at the death of her hufband, over and above her jointure or dower, and preferably to all other reprefentatives [w]. Neither can the hufband devife by his will fuch ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to fell them or give them away [x]. But if fhe continues in the ufe of them till his death, fhe fhall afterwards retain them againft his executors and adminiftrators, and all other perfons except creditors where there is a deficiency of affets [y]. And her neceffary apparel is protected even againft the claim of creditors [z] (3).

VII. A JUDGMENT, in confequence of fome fuit or action in a court of juftice, is frequently the means of vefting the right and property of chattel interefts in the prevailing

t *Ff.* 23. 3. 9. § 3.
u Moor. 213.
w Cro. Car. 343. 1 Roll. Abr. 911. 2 Leon. 166.
x Noy's Max. c. 49. Grahme v. Ld Londonderry. 24 Nov. 1746. Canc.
y 1 P. Wms. 730.
z Noy's Max. c. 49.

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(3) The hufband may difpofe abfolutely of his wife's jewels or other paraphernelia in his lifetime. 3 *Atk.* 394. And although after his death they are liable to his debts, if his perfonal eftate is exhaufted, yet the widow may recover from the heir the amount of what fhe is obliged to pay in confequence of her hufband's fpecialty creditors out of her paraphernalia. 1 *P. Wms.* 730.

But fhe is not entitled to them after his death, if fhe has barred herfelf by an agreement before marriage of every thing fhe could claim out of his perfonal eftate either by the common law or cuftom. 2 *Atk.* 642.

party.

party. And here we muſt be careful to diſtinguiſh between property, the *right* of which is before veſted in the party, and of which only *poſſeſſion* is recovered by ſuit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the poſſeſſion by the proceſs and judgment of the law. Of the former ſort are all debts and *choſes in action*; as if a man gives bond for 20 *l.* or agrees to buy a horſe at a ſtated ſum, or takes up goods of a tradeſman upon an implied contract to pay as much as they are reaſonably worth: in all theſe caſes the right accrues to the creditor, and is completely veſted in him, at the time of the bond being ſealed, or the contract or agreement made; and the law only gives him a remedy to recover the poſſeſſion of that right, which already in juſtice [437] belongs to him. But there is alſo a ſpecies of property to which a man has not any claim or title whatſoever, till after ſuit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common caſes, but accrue at one and the ſame time; and where before judgment had, no man can ſay that he has any abſolute property, either in poſſeſſion or in action. Of this nature are,

1. SUCH penalties as are given by particular ſtatutes, to be recovered on an action *popular*; or, in other words, to be recovered by him or them that will ſue for the ſame. Such as the penalty of 500 *l.* which thoſe perſons are by ſeveral acts of parliament made liable to forfeit, that, being in particular offices or ſituations in life, neglect to take the oaths to the government: which penalty is given to him or them that will ſue for the ſame. Now here it is clear that no particular perſon, A or B, has any right, claim, or demand, in or upon this penal ſum, till after action brought[a]; for he that brings his action, and can *bona fide* obtain judgment firſt, will undoubtedly ſecure a title to it, in excluſion of every body elſe. He obtains an inchoate imperfect degree of property, by commencing his ſuit: but it is not conſummated

a 2 Lev. 141. Stra. 1169. Combe v. Pitt. B. R. Tr. 3 Geo. III.

till judgment; for, if any collusion appears, he loses the priority he had gained [b]. But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty [c]. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where a suit and judgment at law are
[438] not only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed as it were in a state of nature, accessible by all the king's subjects, but the acquired right of none of them: open therefore to the first occupant, who declares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

2. ANOTHER species of property, that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true, that this is not an acquisition so perfectly original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not

[b] Stat. 4 Hen. VII. c. 20.

[c] Cro. Eliz. 138. 11 Rep. 65.

give,

give, but *define*, the right. But, however, though ſtrictly ſpeaking the primary right to a ſatisfaction for injuries is given by the law of nature, and the ſuit is only the means of aſcertaining and recovering that ſatisfaction; yet, as the legal proceedings are the only viſible means of this acquiſition of property, we may fairly enough rank ſuch damages, or ſatisfaction aſſeſſed, under the head of property acquired by ſuit and judgment at law.

3. HITHER alſo may be referred, upon the ſame principle, all title to coſts and expenſes of ſuit; which are often arbitrary, and reſt entirely on the determination of the court, upon weighing all circumſtances, both as to the *quantum*, and alſo (in the courts of equity eſpecially, and upon motions in the courts of law) whether there ſhall be any coſts at all. Theſe coſts therefore, when given by the court to either party, may be looked upon as an acquiſition made by the judgment of law. [439]

CHAPTER THE THIRTIETH.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

VIII. GIFTS then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent: and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a peppercorn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

GRANTS

GRANTS or gifts, of chattels *perſonal*, are the act of tranſferring the right and the poſſeſſion of them; whereby one man renounces, and another man immediately acquires, all title and intereſt therein: which may be done either in writing, or by word of mouth[a] atteſted by ſufficient evidence, of which the delivery of poſſeſſion is the ſtrongeſt and moſt eſſential. But this conveyance, when merely voluntary, is ſomewhat ſuſpicious; and is uſually conſtrued to be fraudulent, if creditors or others become ſufferers thereby. And, particularly, by ſtatute 3 Hen. VII. c. 4. all deeds of gift of goods, made in truſt to the uſe of the donor, ſhall be void: becauſe otherwiſe perſons might be tempted to commit treaſon or felony, without danger of forfeiture; and the creditors of the donor might alſo be defrauded of their rights. And by ſtatute 13 Eliz. c. 5. every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others[b], ſhall be void as againſt ſuch perſons to whom ſuch fraud would be prejudicial; but, as againſt the grantor himſelf, ſhall ſtand good and effectual; and all perſons partakers in, or privy to, ſuch fraudulent grants, ſhall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and alſo on conviction ſhall ſuffer impriſonment for half a year.

A TRUE and proper gift or grant is always accompanied with delivery of poſſeſſion, and takes effect immediately: as if A gives to B 100 *l.*, or a flock of ſheep, and puts him in poſſeſſion of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any conſideration or recompence[c]: unleſs it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, dureſs, or the like; or if he were drawn in, circumvented, or impoſed upon, by falſe pretences, ebriety, or ſurprize. But if the gift does not take effect, by delivery of immediate poſſeſſion, it is then not properly a gift, but a contract: and this a man

[a] Perk. § 57. [b] See 3 Rep. 82. [c] Jenk. 109.

 cannot

cannot be compelled to perform, but upon good and ſufficient conſideration; as we ſhall ſee under our next diviſion (1).

IX. A CONTRACT, which uſually conveys an intereſt merely in action, is thus defined: "an agreement upon "ſufficient conſideration, to do or not to do a particular "thing." From which definition there ariſe three points to be contemplated in all contracts; 1. The *agreement:* 2. The *conſideration:* and 3. The *thing* to be done or omitted, or the different ſpecies of contracts.

FIRST then it is an *agreement*, a mutual bargain or convention; and therefore there muſt at leaſt be two contracting parties, of ſufficient ability to make a contract: as where A contracts with B to pay him 100*l.* and thereby transfers a property in ſuch ſum to B. Which property is however not in poſſeſſion, but in action merely, and recoverable by ſuit at law; wherefore it could not be transferred to another perſon by the ſtrict rules of the ancient common law: for no *choſe* in action could be aſſigned or granted over[d], becauſe it was thought to be a great encouragement to litigiouſneſs, if a man were allowed to make over to a ſtranger his right of going to law. But this nicety is now diſregarded: though, in compliance with the antient principle, the form of aſſigning a *choſe* in action is in the nature of a declaration of truſt, and an agreement to permit the aſſignee to make uſe of the name of the aſſignor, in order to recover the poſſeſſion. And therefore, when in common acceptation a debt or bond is ſaid to be aſſigned over, it muſt ſtill be ſued in the original creditor's name; the perſon to whom it is transferred, being

[d] Co. Litt. 214.

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(1) If a man ſells goods and ſtill continues in poſſeſſion as viſible owner, the ſale is fraudulent, and void againſt creditors. 2 *T. R.* 596. But the ſale or mortgage of a ſhip at ſea is valid, if the grand bill of ſale be delivered to the vendee or mortgagee, and he take poſſeſſion the firſt opportunity after the ſhip arrives in port. 1 *T. R.* 462.

rather

rather an attorney than an aſſignee. But the king is an exception to this general rule; for he might always either grant or receive a *choſe* in action by aſſignment [e]: and our courts of equity, conſidering that in a commercial country almoſt all perſonal property muſt neceſſarily lie in contract, will protect the aſſignment of a *choſe* in action, as much as the law will that of a *choſe* in poſſeſſion [f].

THIS contract or agreement may be either expreſs or implied. [443] *Expreſs* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a ſtated price for certain goods. *Implied* are ſuch as reaſon and juſtice dictate, and which therefore the law preſumes that every man undertakes to perform. As, if I employ a perſon to do any buſineſs for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deſerves. If I take up wares from a tradeſman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is alſo one ſpecies of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, *viz.* that if I fail in my part of the agreement, I ſhall pay the other party ſuch damages as he has ſuſtained by ſuch my neglect or refuſal. In ſhort, almoſt all the rights of perſonal property (when not in actual poſſeſſion) do in great meaſure depend upon contracts of one kind or other, or at leaſt might be reduced under ſome of them: which indeed is the method taken by the civil law; it having referred the greateſt part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quaſi ex contractu* [g].

A CONTRACT may alſo be either *executed*, as if A agrees to change horſes with B, and they do it immediately; in which caſe the poſſeſſion and the right are transferred together: or it may be *executory*, as if they agree to change next week; here

[e] Dyer. 30. Bro. *Abr. tit. choſe in action.* 1 & 4.

[f] 3 P. Wms. 199.

[g] *Inſt.* 3. 14. 2.

the right only vefts, and their reciprocal property in each other's horfe is not in poffeffion but in action; for a contract *executed* (which differs nothing from a grant) conveys a *chofe in poffeffion;* a contract *executory* conveys only a *chofe in action.*

HAVING thus fhewn the general nature of a contract, we are, fecondly, to proceed to the *confideration* upon which it is founded; or the reafon which moves the contracting party to
[444] enter into the contract. "It is an agreement, upon *fufficient* "*confideration.*" The civilians hold, that in all contracts, either exprefs or implied, there muft be fomething given in exchange, fomething that is mutual or reciprocal [h]. This thing, which is the price or motive of the contract, we call the confideration: and it muft be a thing lawful in itfelf, or elfe the contract is void. A *good* confideration, we have before feen [i], is that of blood or natural affection between near relations; the fatisfaction accruing from which the law efteems an equivalent for whatever benefit may move from one relation to another [j]. This confideration may fometimes however be fet afide, and the contract become void, when it tends in it's confequences to defraud creditors or other third perfons of their juft rights. But a contract for any *valuable* confideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a fufficient adequate value, is never fet afide in equity: for the perfon contracted with has then given an equivalent in recompenfe, and is therefore as much an owner, or a creditor, as any other perfon.

THESE valuable confiderations are divided by the civilians [k] into four fpecies. 1. *Do, ut des:* as when I give money or goods, on a contract that I fhall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promife of repayment; and all fales of goods, in which there is either an exprefs contract to pay fo much

[h] *In omnibus contractibus, five nominatis five innominatis, permutatio continetur.* Gravin. *l.* 2. § 12.

[i] page 297.

[j] 3 Rep. 83.

[k] *Ff.* 19. 5. 5.

for

for them, or elſe the law implies a contract to pay ſo much as they are worth. 2. The ſecond ſpecies is, *facio, ut facias*: as, when I agree with a man to do his work for him, if he will do mine for me; or if two perſons agree to marry together; or to do any other poſitive acts on both ſides. Or, it may be to forbear on one ſide on conſideration of ſomething done on the other; as, that in conſideration A, the tenant, will repair his houſe, B, the landlord, will not ſue him for waſte. Or, it may be for mutual forbearance on both ſides; as, that in conſideration that A will not trade to Liſbon, B [445] will not trade to Marſeilles; ſo as to avoid interfering with each other. 3. The third ſpecies of conſideration is *facio, ut des*: when a man agrees to perform any thing for a price, either ſpecifically mentioned, or left to the determination of the law to ſet a value to it. And when a ſervant hires himſelf to his maſter for certain wages or an agreed ſum of money: here the ſervant contracts to do his maſter's ſervice, in order to earn that ſpecific ſum. Otherwiſe, if he be hired generally; for then he is under an implied contract to perform this ſervice for what it ſhall be reaſonably worth. 4. The fourth ſpecies is, *do, ut facias*: which is the direct counterpart of the preceding. As when I agree with a ſervant to give him ſuch wages upon his performing ſuch work: which, we ſee, is nothing elſe but the laſt ſpecies inverted; for *ſervus facit, ut herus det*, and *herus dat, ut ſervus faciat.*

A CONSIDERATION of ſome ſort or other is ſo abſolutely neceſſary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one ſide, without any compenſation on the other, is totally void in law: and a man cannot be compelled to perform it[1] (2). As if one man promiſes

[1] Dr & St. d. 2. c. 24.

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(2) See a very learned diſſertation upon this paſſage, and the learned Judge's obſervation and reference upon a *nudum pactum* in the preceding page, by Mr. Fonblanque in his edition of the Treatiſe of Equity, 1 vol. p. 326. That learned gentleman abundantly proves that a conſideration was not neceſſary to conſtitute a binding

to give another 100*l*. here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honour or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted [m] the maxim of the civil law [n], that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation, (as a promise to pay a just debt, though barred by the statute of limitations) it is no longer *nudum pactum*(3). And as this rule was principally esta-

m Bro. *Abr. tit. dette.* 79. Salk. 129. n *Cod.* 2. 3. 10. & 5. 14. 1.

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binding contract in the civil law; and he concludes, that "from a "view of the different modes by which an obligation could be "created by the civil law, it appears that, without any consideration, a verbal agreement or promise might, in respect of certain prescribed solemnities, acquire a binding force and legal "validity; and further, that for want of a consideration, a written acknowledgment of a debt might be avoided; and that "though a consideration was alleged in writing, it might be denied. If then it be asked, what was a *nudum pactum* by the civil "law? I should submit that, from the above observations, it appears to have been an undertaking to give or to do some particular thing or act, which *neque verbis præscriptis solemnibus vestitum* "*sit, neque facta aut datione rei transiit in contractum innominatum.*"

(3) Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessaries; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds.

In such and many other instances, though the promise gives a compulsory remedy where there was none before, either in law or equity,

blished, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned [o], it therefore does not hold in some cases, where [446] such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument [p], and every note from the subscription of the drawer [q] (4), carries with it an internal evidence of good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

WE are next to consider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing.*" The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale* or *exchange*. 2. That of *bailment*. 3. That of *hiring* and *borrowing*. 4. That of *debt*.

1. SALE or *exchange* is a transmutation of property from one man to another, in consideration of some price or recompense in value: for there is no sale without a recompense; there must be *quid pro quo* [r]. If it be a commutation of goods

[o] Plowd. 308, 309.
[p] Hardr. 200. 1 Ch. Rep. 157.
[q] Lord Raym. 760.
[r] Noy's Max. c. 42.

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equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration. *Ld. Mansfield*, 1 *Cowp.* 290.

(4) Mr. Fonblanque, in his discussion of the subject of consideration, referred to in the last note but one, has taken notice of this inaccuracy: he says, what certainly is fully established, "that the "want of consideration cannot be averred by the maker of a nôte, "if the action be brought by an indorsee; but if the action be "brought by the payee, the want of consideration is a bar to the "plaintiff's recovering upon it." 1 *Stra.* 674. *Bull. N. P.* 274.

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for goods, it is more properly an *exchange;* but, if it be a transferring of goods for money, it is called a *ſale:* which is a method of exchange introduced for the convenience of mankind, by eſtabliſhing an univerſal medium, which may be exchanged for all ſorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjuſt the reſpective values, and the carriage would be intolerably cumberſome. All civilized nations adopted therefore very early the uſe of money; for we find Abraham giving "four hundred ſhekels of ſilver, current money with the merchant," for the field of Machpelah [s]: though the practice of exchange ſtill ſubſiſts among ſeveral of the ſavage nations. But with regard to the *law* of
[447] ſales and exchanges, there is no difference. I ſhall therefore treat of them both under the denomination of ſales only; and ſhall conſider their force and effect, in the firſt place where the vendor *hath* in himſelf, and ſecondly where he *hath not* the property of the thing ſold.

WHERE the vendor *hath* in himſelf the property of the goods ſold, he hath the liberty of diſpoſing of them to whom ever he pleaſes, at any time, and in any manner: unleſs judgment has been obtained againſt him for a debt or damages, and the writ of execution is actually delivered to the ſheriff. For then, by the ſtatute of frauds [f], the ſale ſhall be looked upon as fraudulent, and the property of the goods ſhall be bound to anſwer the debt, from the time of delivering the writ. Formerly it was bound from the *teſte*, or iſſuing, of the writ [t], and any ſubſequent ſale was fraudulent; but the law was thus altered in favour of *purchaſors*, though it ſtill remains the ſame between the *parties:* and therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors [v] (5).

s Gen. c. 23. v. 16.
f 29 Car. II. c. 3.
t 8 Rep. 171. 1 Mod. 188.
v Comb. 33. 12 Mod. 5. 7 Mod. 95.

(5) If two writs are delivered to the ſheriff on the ſame day, he is bound to execute the firſt which he receives; but if he levies and

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no ſale without payment, unleſs the contrary be expreſsly agreed. And therefore, if the vendor ſays, the price of a beaſt is four pounds, and the vendee ſays he will give four pounds, the bargain is ſtruck; and they neither of them are at liberty to be off, provided immediate poſſeſſion be tendered by the other ſide. But if neither the money be paid, nor the goods delivered, nor tender made, nor any ſubſequent agreement be entered into, it is no contract, and the owner may diſpoſe of the goods as he pleaſes [u]. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earneſt* (which the civil law calls *arrha*, and interprets to be "*emptionis-venditi-* [448]
"*onis contractae argumentum* [w]," the property of the goods is abſolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them [x] (6). And ſuch regard does the law pay to earneſt as an evidence of a contract, that, by the ſame ſtatute 29 Car. II. c. 3. no contract for the ſale of goods, to the value of 10*l.* or more, ſhall

u Hob. 41. Noy's Max. c. 42.

w *Inſt.* 3. *tit.* 24.

x Noy. *ibid.*

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and ſells under the ſecond, the ſale to a vendee, without notice of the firſt, is irrevocable, and the ſheriff makes himſelf anſwerable to both parties. 1 *Salk.* 320. 1 *T. R.* 729.

(6) The property does not ſeem to be *abſolutely bound* by the earneſt; for lord Holt has laid down the following rules, *viz.* "That notwithſtanding the earneſt, the money muſt be paid upon "fetching away the goods, becauſe no other time for payment is "appointed; that earneſt only binds the bargain, and gives the "party a right to demand; but then a demand without the pay-"ment of the money is void; that after earneſt given the vendor "cannot ſell the goods to another, without a default in the vendee; "and therefore if the vendee does not come and pay, and take the "goods, the vendor ought to go and requeſt him; and then if he "does not come and pay, and take away the goods in convenient "time, the agreement is diſſolved, and he is at liberty to ſell them "to any other perſon." 1 *Salk.* 113.

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be valid, unlefs the buyer actually receives part of the goods fold, by way of earneft on his part; or unlefs he gives part of the price to the vendor by way of earneft to bind the bargain, or in part of payment; or unlefs fome note in writing be made and figned by the party, or his agent, who is to be charged with the contract. And, with regard to goods under the value of 10 *l.* no contract or agreement for the fale of them fhall be valid, unlefs the goods are to be delivered within one year, or unlefs the contract be made in writing, and figned by the party, or his agent, who is to be charged therewith (7). Antiently, among all the northern nations, fhaking of hands was held neceffary to bind the bargain; a cuftom which we ftill retain in many verbal contracts. A fale thus made was called *handfale*, "*venditio per mutuam manuum complexionem*[y]; till in procefs of time the fame word was ufed to fignify the price or earneft, which was given immediately after the fhaking of hands, or inftead thereof.

As foon as the bargain is ftruck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on[z]. But if he tenders the money to the vendor, and he refufes it, the vendee may feize the goods, or have an action againft the vendor for detaining them. And by a regular fale, without delivery, the property is fo abfolutely vefted in the vendee, that if A fells a horfe to B for 10 *l.* and B pays him earneft, or figns a note in writing of the bargain; and afterwards, before the delivery of the

y Stiernhook *de jure Goth. l.* 2. *c.* 5.

z Hob. 41.

(7) It is fully eftablifhed, that contracts for goods which are not to be delivered immediately, are not within the ftatute, and are binding without a writing; as an agreement to take a carriage when it is built, and the like. 4 *Burr.* 2101. And this is binding, though in fact the carriage is not delivered within the year; but if the original agreement was, that it fhould not at any event be delivered till after a year, then the contract will not be valid unlefs it is reduced into writing.

horfe

horſe or money paid, the horſe dies in the vendor's cuſtody; ſtill he is entitled to the money, becauſe, by the contract, the property was in the vendee [a]. Thus may property in goods be transferred by ſale, where the vendor *hath* ſuch property in himſelf.

BUT property may alſo in ſome caſes be transferred by ſale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be ſecure of his purchaſe; otherwiſe all commerce between man and man muſt ſoon be at an end. And therefore the general rule of law is [b], that all ſales and contracts of any thing vendible, in fairs or markets *overt*, (that is, open) ſhall not only be good between the parties, but alſo be binding on all thoſe that have any right or property therein. And for this purpoſe, the mirroir informs us [c], were tolls eſtabliſhed in markets, *viz.* to teſtify the making of contracts; for every private contract was diſcountenanced by law: inſomuch, that our Saxon anceſtors prohibited the ſale of any thing above the value of twenty pence, unleſs in open market, and directed every bargain and ſale to be contracted in the preſence of credible witneſſes [d]. Market overt in the country is only held on the ſpecial days, provided for particular towns by charter or preſcription; but in London every day, except Sunday, is market day [e]. The market place, or ſpot of ground ſet apart by cuſtom for the ſale of particular goods, is alſo in the country the only market overt [f]; but in London every ſhop in which goods are expoſed publickly to ſale, is market overt, for ſuch things only as the owner profeſſes to trade in [g]. But if my goods are ſtolen from me, and ſold, out of market overt, my property is not altered, and I may take them whereever I find them. And it is expreſsly provided by ſtatute 1 Jac. I. c. 21. that the ſale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof,

[a] Noy c. 42.
[b] 2 Inſt. 713.
[c] c. 1. § 3.
[d] *LL. Æthel.* 10. 12. *LL. Eadg.* Wilk. 80.
[e] Cro. Jac. 68.
[f] Godb. 131.
[g] 5 Rep. 83. 12 Mod. 521.

shall

ſhall not alter the property: for this, being uſually a clandeſtine trade, is therefore made an exception to the general
[450] rule. And, even in market overt, if the goods be the property of the king, ſuch ſale (though regular in all other reſpects) will in no caſe bind him; though it binds infants, feme coverts, idiots or lunatics, and men beyond ſea or in priſon: or if the goods be ſtolen from a common perſon, and then taken by the king's officer from the felon, and ſold in open market; ſtill, if the owner has uſed due diligence in proſecuting the thief to conviction, he loſes not his property in the goods[h] (8). So likewiſe, if the buyer knoweth the property not to be in the ſeller; or there be any other fraud in the tranſaction; if he knoweth the ſeller to be an infant, or feme covert not uſually trading for herſelf; if the ſale be not originally and wholly made in the fair or market, or not at the uſual hours; the owner's property is not bound thereby[i]. If a man buys his own goods in a fair or market, the contract of ſale ſhall not bind him, ſo that he ſhall render the price; unleſs the property had been previouſly altered by a former ſale[k]. And, notwithſtanding any number of intervening ſales, if the original vendor, who ſold without having the property, comes again into poſſeſſion of the goods, the original owner may take them, when found in his hands who was guilty of the firſt breach of juſtice[l]. By which wiſe regulations the common law has ſecured the right of the proprietor in perſonal chattels from being deveſted, ſo far as was conſiſtent with that other neceſſary policy, that purchaſers, *bona fide*, in a fair, open, and regular manner, ſhould not be afterwards put to difficulties by reaſon of the previous knavery of the ſeller.

BUT there is one ſpecies of perſonal chattels, in which the property is not eaſily altered by ſale, without the expreſs con-

h Bacon's uſe of the law. 158.
i 2 Inſt. 713, 714.
k Perk. § 93.
l 2 Inſt. 713.

(8) The owner of goods ſtolen, who has proſecuted the thief to conviction, cannot recover the value of his goods from any one who has purchaſed them and ſold them again, even with notice of the theft, before the conviction. 2 *T. R.* 750.

ſent of the owner, and thoſe are horſes[m]. For a purchaſer gains no property in a horſe that has been ſtolen, unleſs it be bought in a fair or market overt, according to the directions of the ſtatutes 2 P. & M. c. 7. and 31 Eliz. c. 12. By which it is enacted, that the horſe ſhall be openly expoſed, in the time of ſuch fair or market, for one whole hour together, between ten in the morning and ſunſet, in the public place, uſed for ſuch ſales, and not in any private yard or ſtable; and afterwards brought by both the vendor and vendee to the book-keeper of ſuch fair or market: that toll be paid, if any be due; and if not, one penny to the book-keeper, who ſhall [451] enter down the price, colour, and marks of the horſe, with the names, additions, and abode of the vendee and vendor; the latter being properly atteſted. Nor ſhall ſuch ſale take away the property of the owner, if within ſix months after the horſe is ſtolen he puts in his claim before ſome magiſtrate, where the horſe ſhall be found; and, within forty days more, proves ſuch his property by the oath of two witneſſes, and tenders to the perſon in poſſeſſion ſuch price as he *bona fide* paid for him in market overt. But in caſe any one of the points before-mentioned be not obſerved, ſuch ſale is utterly void; and the owner ſhall not loſe his property, but at any diſtance of time may ſeize or bring an action for his horſe, wherever he happens to find him.

By the civil law [n] an implied warranty was annexed to every ſale, in reſpect to the title of the vendor: and ſo too in our law, a purchaſer of goods and chattels may have a ſatisfaction from the ſeller, if he ſells them as his own and the title proves deficient, without any expreſs warranty for that purpoſe [o]. But with regard to the goodneſs of the wares ſo purchaſed, the vendor is not bound to anſwer: unleſs he expreſsly warrants them to be ſound and good [p], or unleſs he knew them to be otherwiſe and hath uſed any art to diſguiſe them [q], or unleſs they turn out to be different from what he repreſented them to the buyer (9).

m 2 Inſt. 719.
n *Ff.* 21. 2. 1.
o Cro. Jac. 474. 1 Roll. Abr. 90.
p F. N. B. 94.
q 2 Roll. Rep. 5.

(9) The following diſtinctions ſeem peculiarly referable to the ſale of horſes. If the purchaſer gives what is called a *ſound* price,

 that

2. BAILMENT, from the French *bailler*, to deliver, is a delivery of goods in truſt, upon a contract expreſſed or implied, that the truſt ſhall be faithfully executed on the part of the bailee. As if cloth be delivered, or (in our legal dialect) bailed, to a taylor to make a ſuit of cloaths, he has it upon an implied contract to render it again when made, and that in a workmanly manner [r]. If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry, them to the perſon appointed [s]. If a horſe, or other goods, be delivered to an inn-keeper or his ſervants, he is bound to keep
[452] them ſafely, and reſtore them when his gueſt leaves the houſe [t]. If a man takes in a horſe, or other cattle, to graze and depaſture in his grounds, which the law calls *agiſtment*, he takes them upon an implied contract to return them on demand to the owner [u]. If a pawnbroker receives plate or jewels as a pledge, or ſecu-

[r] 1 Ventr. 268.
[s] 12 Mod. 482.
[t] Cro. Eliz. 622.
[u] Cro. Car. 271.

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that is, ſuch as from the appearance and nature of the horſe would be a fair and full price for it, if it were in fact free from blemiſh and vice, and he afterwards diſcovers it to be unſound or vicious, and returns it in a reaſonable time, he may recover back the price he has paid in an action againſt the ſeller for ſo much money had and received to his uſe, provided he can prove the ſeller knew of the unſoundneſs or vice at the time of the ſale; for the concealment of ſuch a material circumſtance is a fraud, which vacates the contract.

But if a horſe is ſold with an expreſs warranty by the ſeller that it is ſound and free from vice, the buyer may maintain an action upon this warranty or ſpecial contract without returning the horſe to the ſeller, or without even giving him notice of the unſoundneſs or viciouſneſs of the horſe; yet it will raiſe a prejudice againſt the buyer's evidence, if he does not give notice within a reaſonable time that he has reaſon to be diſſatisfied with his bargain. *H. Bl.* 17.

The warranty cannot be tried in a general action of aſſumpſit to recover back the price of the horſe. *Cowp.* 819. In a warranty it is not neceſſary to ſhew that the ſeller knew of the horſe's imperfections at the time of the ſale.

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rity, for the repayment of money lent thereon at a day certain, he has them upon an expreſs contract or condition to reſtore them, if the pledgor performs his part by redeeming them in due time [w]: for the due execution of which contract many uſeful regulations are made by ſtatute 30 Geo. II. c. 24 (10). And ſo if a landlord diſtrains goods for rent, or a pariſh officer for taxes, theſe for a time are only a pledge in the hands of the diſtrainors, and they are bound by an implied contract in law to reſtore them on payment of the debt, duty, and expenſes, before the time of ſale; or, when ſold, to render back the overplus. If a friend delivers any thing to his friend to keep for him, the receiver is bound to reſtore it on demand: and it was formerly held that in the mean time he was anſwerable for any damage or loſs it might ſuſtain, whether by accident or otherwiſe [x]; unleſs he expreſsly undertook [y] to keep it only with the ſame care as his own goods, and then he ſhould not be anſwerable for theft or other accidents. But now the law ſeems to be ſettled [z], that ſuch a general bailment will not charge the bailee with any loſs, unleſs it happens by groſs neglect, which is an evidence of fraud: but, if he undertakes ſpecially to keep the goods ſafely and ſecurely, he is bound to take the ſame care of them, as a prudent man would take of his own [a].

In all theſe inſtances there is a ſpecial qualified property transferred from the bailor to the bailee, together with the poſſeſſion. It is not an abſolute property, becauſe of his contract for reſtitution; the bailor having ſtill left in him the [453] right to a *choſe* in action, grounded upon ſuch contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action againſt ſuch as injure or take away theſe chattels. The taylor, the carrier,

w Cro. Jac. 245. Yelv. 178.

x Co. Litt. 89.

y 4 Rep. 84.

z Lord. Raym. 909. 12 Mod. 487.

a By the laws of Sweden the depoſitary of bailee of goods is not bound to reſtitution, in caſe of accident by fire or theft: provided his own goods periſhed in the ſame manner: "*jura enim noſtra*," ſays Stiernhook, "*dolum praeſumunt, ſi una non pereant.*" (*De jure Sueon. l.* 2. c. 5.)

(10) And further regulated by ſtatute 29 Geo. III. c. 57.

the inn-keeper, the agiſting farmer, the pawn-broker, the diſtreinor, and the general bailee, may all of them vindicate, in their own right, this their poſſeſſory intereſt, againſt any ſtranger or third perſon [b]. For, being reſponſible to the bailor, if the goods are loſt or damaged by his wilful default or groſs negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reaſonable that he ſhould have a right of action againſt all other perſons who may have purloined or injured them; that he may always be ready to anſwer the call of the bailor (11).

[b] 13 Rep. 69.

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(11) The learned Judge has claſſed indiſcriminately together a number of bailments, which are very diſſimilar in their nature and legal conſequences. This ſubject forms a very important branch of the law of England. In order to acquire a knowledge of the numerous and nice diſtinctions which the law of bailments comprehends, it is neceſſary that the ſtudent ſhould peruſe with attention lord Holt's judgment in the report of Cogs *v.* Bernard, in *Lord Raym.* 909; and afterwards *Sir William Jones's Eſſay on the Law of Bailments*, where theſe diſtinctions are examined and diſcuſſed, as I conceive, with not leſs learning and ingenuity than ſound judgment and juſt concluſions.

Sir William Jones has reduced the law of bailments as it were to a ſcale, by which he limits the degree of neglect which every bailee is anſwerable for.

He divides neglect into three kinds, which he thus defines:

" Ordinary neglect is the omiſſion of that care, which every man " of common prudence, and capable of governing a family, takes " of his own concerns.

" Groſs neglect is the want of that care, which every man of " common ſenſe, how inattentive ſoever, takes of his own " property.

" Slight neglect is the omiſſion of that diligence, which very " circumſpect and thoughtful perſons uſe in ſecuring their own " goods and chattels."

A carrier is liable even without any degree of neglect; for from principles of public policy he is anſwerable if he is robbed of the goods;

3. HIRING and *borrowing* are alſo contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for

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goods; and for every other loſs, which does not happen by the act of God, (that is, without human agency,) or by the king's enemies.

An inn-keeper, for the ſame reaſons, is alſo liable for a theft or robbery of his gueſt's goods, committed in his houſe. See 1 vol. 430. n. 11.

But the agiſting farmer, the taylor, and the pawnee, are anſwerable only for ordinary neglect; ſo if a horſe be ſent to agiſt, and it be ſtolen, the owner cannot recover the value from the farmer as from a carrier and inn-keeper, unleſs he was ſtolen by the negligence of the farmer, as by leaving the gate of the field open; or unleſs the farmer has expreſsly undertaken to be anſwerable for ſuch a loſs. *Law of Bailm.* 92.

A friendly depoſitary is reſponſible only for groſs neglect; and not even for that, if his character is known to the depoſitor, and he takes no better care of his own goods, and they alſo at the ſame time are ſpoiled or deſtroyed. *Ib.* 120.

Wherever a debt accrues to the bailee from the bailor, in conſequence of the bailment, as where a horſe is delivered to an inn-keeper to take care of, or to a farmer to agiſt, or to a farrier to ſhoe; or where cloth is given to a taylor to make into a coat, or to a dyer to dye; or corn to a miller to grind: in all ſuch caſes the bailee has, what is called, a *lien* upon the thing bailed; that is, he may detain it till the debt incurred by the bailment is diſcharged by the bailor.

But he has only a lien upon the article bailed for the debt, which accrues upon the laſt bailment of it, and he cannot retain it till the bailor has paid him a demand, which aroſe upon former bailments, where he reſtored the thing bailed without availing himſelf of his lien. 4 *Burr.* 2214.

Any perſon may be a pawnee; that is, may take a pledge or pawn as a ſecurity for money lent, provided he takes no more than legal intereſt, 29 Geo. III. c. 57. ſ. 23. But if plate or any chattel is given to one perſon for life, and after his death to another, if he who has the life-intereſt pawns the article for a valuable conſideration, the pawnbroker or pawnee has no lien upon it againſt

a price, or ſtipend, or additional recompenſe; borrowing is merely gratuitous. But the law in both caſes is the ſame (12). They are both contracts, whereby the poſſeſſion and a tranſient property is transferred for a particular time or uſe, on condition to reſtore the goods ſo hired or borrowed, as ſoon as the time is expired or uſe performed; together with the price or ſtipend (in caſe of hiring) either expreſsly agreed on by the parties, or left to be implied by law according to the value of the ſervice. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to uſe it with moderation and not abuſe it; and the owner or lender retains a reverſionary intereſt in the ſame, and acquires a new property in the price or reward. Thus if a man hires or borrows a horſe for a month, he has the poſſeſſion and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes (in caſe of hiring) entitled alſo to the price, for which the horſe was hired [c].

[454] THERE is one ſpecies of this price or reward, the moſt uſual of any, but concerning which many good and learned men have in former times very much perplexed themſelves and other people, by raiſing doubts about it's legality *in foro conſcientiae*. That is, when money is lent on a contract to receive not only the principal ſum again, but alſo an increaſe by way of compenſation for the uſe; which generally is called

[c] Yelv. 172. Cro. Jac. 236.

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the perſon who is entitled to the intereſt in remainder, although the ſettlement was concealed from the pawnee, and he was impoſed upon by the perſon who pawned the article. 2 *T. R.* 376.

(12) The learned Commentator has here followed lord Holt, who has treated a *commodatum* and a *locatio* without diſtinction. *Lord Raym.* 916. But this ſeems to be properly corrected by *Sir W. Jones*, 85; who concludes, that the hirer of a thing is anſwerable only for ordinary neglect; but that a gratuitous borrower is reſponſible even for ſlight negligence. *Ib.* 120.

intereſt

intereſt by thoſe who think it lawful, and *uſury* by thoſe who do not ſo. For the enemies to intereſt in general make no diſtinction between that and uſury, holding any increaſe of money to be indefenſibly uſurious. And this they ground as well on the prohibition of it by the law of Moſes among the Jews, as alſo upon what is ſaid to be laid down by Ariſtotle [d], that money is naturally barren, and to make it breed money is prepoſterous, and a perverſion of the end of it's inſtitution, which was only to ſerve the purpoſes of exchange, and not of increaſe. Hence the ſchool divines have branded the practice of taking intereſt, as being contrary to the divine law both natural and revealed; and the canon law [e] has proſcribed the taking any, the leaſt, increaſe for the loan of money as a mortal ſin.

BUT, in anſwer to this, it hath been obſerved, that the Moſaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking uſury from their brethren the Jews; but in expreſs words permitted them to take it of a ſtranger [f]: which proves that the taking of moderate uſury, or a reward for the uſe, for ſo the word ſignifies, is not *malum in ſe*; ſince it was allowed where any but an Iſraelite was concerned. And as to the reaſon ſuppoſed to be given by Ariſtotle, and deduced from the natural barrenneſs of money, the ſame may with equal force be alleged of houſes, which never breed houſes; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to hire. And though money was originally uſed only for the purpoſes of exchange, yet the laws of any ſtate may be well juſtified in permitting it to be turned to the purpoſes of profit, if the convenience of ſociety (the great end [455] for which money was invented) ſhall require it. And that the allowance of moderate intereſt tends greatly to the benefit of the public, eſpecially in a trading country, will appear from that generally acknowleged principle, that commerce cannot ſubſiſt without mutual and extenſive credit. Unleſs money therefore can be borrowed, trade cannot be carried on: and

[d] *Polit. l.* 1. *c.* 10. This paſſage hath been ſuſpected to be ſpurious.

[e] *Decretal. l.* 5. *tit.* 19.

[f] Deut. xxiii. 20.

if no premium were allowed for the hire of money, few perſons would care to lend it; or at leaſt the eaſe of borrowing at a ſhort warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkiſh ſuperſtition and civil tyranny, when intereſt was laid under a total interdict, commerce was alſo at it's loweſt ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itſelf it's inſeparable companion, the doctrine of loans upon intereſt. And, as to any ſcruples of conſcience, ſince all other conveniences of life may either be bought or hired, but money can only be hired, there ſeems to be no greater oppreſſion in taking a recompenſe or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conſcience, for the loan of a horſe, or the loan of a ſum of money: but a reaſonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his loſing it entirely, is not more immoral in one caſe than it is in the other. Indeed the abſolute prohibition of lending upon any, even moderate intereſt, introduces the very inconvenience which it ſeems meant to remedy. The neceſſity of individuals will make borrowing unavoidable. Without ſome profit allowed by law, there will be but few lenders: and thoſe principally bad men, who will break through the law, and take a profit; and then will endeavour to indemnify themſelves from the danger of the penalty, by making that profit exorbitant. A capital diſ-
[456] tinction muſt therefore be made between a moderate and exorbitant profit; to the former of which we uſually give the name of intereſt, to the latter the truly odious appellation of uſury; the former is neceſſary in every civil ſtate, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated ſociety. For, as the whole of this matter is well ſummed up by Grotius[g], "if the compenſation allowed by law does

[g] *de j. b. & p. l.* 2. *c.* 12. § 22.

"not

"not exceed the proportion of the hazard run, or the want felt, "by the loan, it's allowance is neither repugnant to the re-"vealed nor the natural law: but if it exceeds those bounds, "it is then oppressive usury; and though the municipal laws "may give it impunity, they never can make it just."

WE see, that the exorbitance or moderation of interest, for money lent, depends upon two circumstances; the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate therefore of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be: but where there is not enough circulating cash, or barely enough, to answer the ordinary uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.

So also the hazard of an entire loss has it's weight in the [457] regulation of interest: hence, the better the security, the lower will the interest be; the rate of interest being generally in a compound *ratio*, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the

quantity of ſpecie in a nation be ſuch, that the general inconvenience of lending for a year is computed to amount to *three per cent.* : a man that has money by him will perhaps lend it upon a good perſonal ſecurity at *five per cent.* allowing two for the hazard run; he will lend it upon landed ſecurity or mortgage at *four per cent.* the hazard being proportionably leſs; but he will lend it to the ſtate, on the maintenance of which all his property depends, at *three per cent.* the hazard being none at all.

BUT ſometimes the hazard may be greater, than the rate of intereſt allowed by law will compenſate. And this gives riſe to the practice of, 1. Bottomry, or *reſpondentia.* 2. Policies of inſurance. 3. Annuities upon lives.

AND firſt, *bottomry* (which originally aroſe from permitting the maſter of a ſhip, in a foreign country, to hypothecate the ſhip in order to raiſe money to refit) is in the nature of a mortgage of a ſhip; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ſhip *(partem pro toto)* as a ſecurity for the repayment. In which caſe it is underſtood, that if the ſhip be loſt, the lender loſes alſo his whole money; but, if it returns in ſafety, then he ſhall receive back his principal, and alſo the premium or intereſt agreed upon, however it may exceed the legal rate of intereſt. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reaſon of the extraordinary hazard run by the lender[h].
[458] And in this caſe the ſhip and tackle, if brought home, are anſwerable (as well as the perſon of the borrower) for the money lent. But if the loan is not upon the veſſel, but upon the goods and merchandize, which muſt neceſſarily be ſold or exchanged in the courſe of the voyage, then only the borrower, perſonally, is bound to anſwer the contract; who therefore in this caſe is ſaid to take up money at *reſpondentia.* Theſe terms are alſo applied to contracts for the repayment

h Moll. *de jur. mar.* 361. Malyne. *lex mercat.* b. 1. c. 31. Bacon's eſſays. c. 41. Cro. Jac. 208. Bynkerſh. *quaeſt jur. privat. l.* 3. *c.* 16.

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of money borrowed, not on the ſhip and goods only, but on the mere hazard of the voyage itſelf; when a man lends a merchant 1000 *l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary intereſt, in caſe ſuch a voyage be ſafely performed[i]: which kind of agreement is ſometimes called *foenus nauticum*, and ſometimes *uſura maritima*[j]. But as this gave an opening for uſurious and gaming contracts, eſpecially upon long voyages, it was enacted by the ſtatute 19 Geo. II. c. 37. that all monies lent on bottomry or at *reſpondentia*, on veſſels bound to or from the Eaſt Indies, ſhall be expreſsly lent only upon the ſhip or upon the merchandize; that the lender ſhall have the benefit of ſalvage[k]; and that if the borrower hath not an intereſt in the ſhip, or in the effects, on board equal to the value of the ſum borrowed, he ſhall be reſponſible to the lender for ſo much of the principal as hath not been laid out, with legal intereſt and all other charges, though the ſhip and merchandize be totally loſt (13).

i 1 Sid. 27.
j Molloy *ibid.* Malyne *ibid.*
k See Vol. I. page 294.

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(13) It is an eſtabliſhed rule, that no contract is within the ſtatute of uſury, although more than five *per cent.* is to be paid upon money advanced, if the principal is actually put in hazard, and may be totally loſt to the lender. The general nature of a reſpondentia bond is this, the borrower binds himſelf in a large penal ſum, upon condition that the obligation ſhall be void, if he pay the lender the ſum borrowed, and ſo much a month from the date of the bond till the ſhip arrives at a certain port, or if the ſhip be loſt or captured in the courſe of the voyage. The reſpondentia intereſt is frequently at the rate of forty or fifty *per cent.* or in proportion to the riſk and profit of the voyage; for the reſpondentia lender may be conſidered as a material partner in the loſs and gain of the adventure; and therefore he may inſure his intereſt in the ſucceſs of the voyage, but it muſt be expreſsly ſpecified in the policy to be reſpondentia intereſt, 3 *Burr.* 1394; unleſs there is a particular uſage to the contrary. *Park. Inſ.* 11. A lender upon reſpondentia is not obliged to pay ſalvage or average loſſes, but he is entitled to receive the whole ſum advanced, provided the ſhip and cargo arrive

SECONDLY, a policy of *insurance* is a contract between A and B, that, upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I insure a ship to the Levant, and back again, at *five per cent;* here I calculate the chance that she performs her voyage to be twenty to one against her being lost: and, if she be lost, I lose 100 *l.* and get 5 *l.* Now this is much the same as if I lend the merchant whose whole fortunes are embarked in this vessel, 100*l.* at
[459] the rate of *eight per cent.* For by a loan I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to *three per cent:* if therefore I had actually lent him 100 *l.* I must have added 3 *l.* on the score of inconvenience, to the 5 *l.* allowed for the hazard, which together would have made 8 *l.* But, as upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent to 5 *l.* which is therefore the legal interest: but there is also a special hazard in this case; for, if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reasonable rate of interest in this case would be *fifteen per cent.* But this the law, to

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rive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship. *Ib.* 421.

avoid

avoid abuſes, will not permit to be taken: Sempronius therefore gives Titius the lender only 5*l.* the legal intereſt; but applies to Gaius an inſurer, and gives him the other 10*l.* to indemnify Titius againſt the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided againſt, which the eſtabliſhed rate of intereſt will not reach; that being calculated by the ſtate to anſwer only the ordinary and general hazard, together with the lender's inconvenience in parting with his ſpecie for the time (14). But, in order to prevent theſe inſurances from being turned into a miſchievous kind of gaming, it is enacted by ſtatute 14 Geo. III. c. 48. that no inſurance ſhall be made on lives, or on any other event, wherein the party inſured hath no intereſt; that in all policies the name of ſuch intereſted party ſhall be inſerted; and nothing more ſhall be recovered thereon than the amount of the intereſt of the inſured. [460]

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(14) Inſurance is in effect nothing more than a wager, for the underwriter, who inſures at five *per cent.* receives five pounds to return one hundred upon the contingency of a certain event; and it is preciſely the ſame in it's conſequences, as if he had betted a wager of 95*l.* to five, or nineteen to one, that the ſhip arrives ſafe, or that a certain event does not happen. So where a life is inſured for a year at ten *per cent.*; that is, where ten pounds are received to pay one hundred, if a certain perſon dies within a year; this inſurance is in effect preciſely the ſame as a wager of nine to one, that the perſon, whoſe life is inſured, lives a year. It is not ſurpriſing then that inſurance ſhould have become ſo prevalent and pernicious a mode of gaming, that the legiſlature was obliged to repreſs it, and to confine it within thoſe limits, within which it is beneficial or abſolutely neceſſary to the ſecurity of commerce. The writers of mercantile law, with that natural partiality which authors feel for their ſubjects, have amuſed themſelves by endeavouring to diſcover what country could firſt claim the honour of the invention of inſurance. But it is a contract far too ſimple, and too obvious to the underſtandings of mankind, however uncultivated, to be dignified by the name of invention. Yet its progreſs and refinements would be a neceſſary conſequence of the extenſion of commerce, and the gradual improvement in the ſcience of law.

THIS doth not however extend to marine inſurances, which were provided for by a prior law of their own. The learning relating to theſe inſurances hath of late years been greatly improved by a ſeries of judicial deciſions; which have now eſtabliſhed the law in ſuch a variety of caſes, that (if well and judiciouſly collected) they would form a very complete title in a code of commercial juriſprudence: but, being founded on equitable principles, which chiefly reſult from the ſpecial circumſtances of the caſe, it is not eaſy to reduce them to any general heads in mere elementary inſtitutes. Thus much however may be ſaid; that, being contracts, the very eſſence of which conſiſts in obſerving the pureſt good faith and integrity, they are vacated by any the leaſt ſhadow of fraud or undue concealment: and, on the other hand, being much for the benefit and extenſion of trade, by diſtributing the loſs or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament (15). But as a practice had obtained of inſuring large ſums without having any property on board, which were called inſurances, *intereſt or no intereſt*, and alſo of inſuring the ſame goods ſeveral times over; both of which were a ſpecies of gaming, without any advantage to commerce, and were denominated *wagering* policies: it is therefore enacted by the ſtatute 19 Geo. II. c. 37. that all inſurances, intereſt or no intereſt, or without farther proof of intereſt than the policy itſelf, or by way of gaming or wagering, or without benefit of ſalvage to the inſurer, (all of which had the ſame pernicious tendency) ſhall be totally null and void, except upon privateers, or upon ſhips

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(15) The contract of inſurance is founded upon the pureſt principles of morality and abſtract juſtice. Hence it is neceſſary that the contracting parties ſhould have perfectly equal knowledge or ignorance of every material circumſtance reſpecting the thing inſured. If on either ſide there is any miſrepreſentation or *allegatio falſi*, or concealment or *ſuppreſſio veri*, which would in any degree affect the premium, or the terms of the engagement, the contract is fraudulent and abſolutely void. See various inſtances in *Park's Inſ.* c. x.

or

or merchandize from the Spaniſh and Portugueſe dominions, for reaſons ſufficiently obvious; and that no re-aſſurance ſhall be lawful, except the former inſurer ſhall be inſolvent, a bankrupt, or dead; and laſtly, that, in the Eaſt India trade, the lender of money on bottomry, or at *reſpondentia*, ſhall alone have a right to be inſured for the money lent, and the borrower ſhall (in caſe of a loſs) recover no more upon any [461]
inſurance than the ſurplus of his property, above the value of his bottomry or *reſpondentia* bond (16).

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(16) This ſtatute does not extend to foreign ſhips, upon which, as before the ſtatute, there may ſtill be inſurances, *intereſt or no intereſt.* Theſe were not included in the act, on account of the difficulty of bringing witneſſes from abroad to prove the intereſt. *Doug.* 302. But where there is an intereſt on board, the owner by a *valued* policy, in which the value of the goods is agreed upon and fixed between the parties, may inſure far beyond the extent of the real value. For the exceſs of the inſurance is held not to be within the ſtatute, unleſs it ſhould appear that the intereſt is ſo ſmall as to be a mere evaſion of the act, and a pretence for gaming. In an open policy, where no value is fixed, the prime coſt of the goods muſt be proved. 2 *Burr.* 1170.

A re-aſſurance is the contract, which an inſurer, who wiſhes to be indemnified againſt the riſk he has taken upon himſelf, makes with another perſon, by giving him a premium to re-aſſure to him the ſame event, which he himſelf has inſured. Re-aſſurances are prohibited by the ſtatute 19 Geo. II. c. 37. both upon foreign and Engliſh ſhips, unleſs the aſſurer is inſolvent, a bankrupt, or dead, in which caſes he, his aſſignée, or perſonal repreſentative, may make a re-aſſurance, which muſt be expreſly mentioned as a re-aſſurance in the policy. 2 *T. R.* 161. The object of prohibiting re-aſſurance, was to prevent idle gaming ſpeculations, by perſons endeavouring to obtain a high premium for inſurance, and then to ſecure themſelves by getting the ſame riſk inſured at a lower rate. The learned Judge ſeems to have miſtaken a double inſurance for a re-aſſurance: a double inſurance is where the owner inſures his goods twice or *ſeveral times over*, with different underwriters, which he may lawfully do. By which means he increaſes his ſecurity, and though he cannot recover more than a ſingle ſatisfac-

THIRDLY, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot without the utmost difficulty be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bona fide* (and not colourably[1]) put in jeopardy, no inequality of price will make it an usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity. To throw however some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute 17 Geo. III. c. 26. has directed, that upon the sale of any life annuity of more than the value

[1] Carth. 67.

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tion for his loss, yet he may bring his action against any one of the underwriters, and compel him to pay the whole extent of the interest insured: And this underwriter may afterwards recover from each of the rest, a rateable satisfaction or apportionment of the sum, which he has been obliged to pay to the assured. *Park. Ins.* 280. The law of insurance is fully and ably collected and arranged by Mr. Park, in his System of the Law of Marine Insurances. For the benefit of students and of readers in general, the Editor, upon a future occasion, will give an abridgment of all the principles of this important and elegant branch of English jurisprudence.

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of ten pounds *per annum* (unless on a sufficient pledge of lands in fee simple (17) or stock in the public funds) the true consideration, which shall be in money only, shall be set forth and described in the security itself (18); and a memorial of the date of the security, of the names of the parties, *cestuy que trusts*, *cestuy que vies*, and witnesses, and of the consideration money, shall within twenty days after it's execution be inrolled in the court of chancery; else the security shall be null and void: and, in case of collusive practices respecting the consideration, the court, in which any action is brought or judg- [462]
ment obtained upon such collusive security, may order the same to be cancelled, and the judgment (if any) to be vacated: and also all contracts for the purchase of annuities from infants shall remain utterly void, and be incapable of confirmation after such infants arrive to the age of maturity. But to return to the doctrine of common interest on loans:

UPON the two principles of inconvenience and hazard, compared together, different nations have, at different times, established different rates of interest. The Romans at one time allowed *centesimae*, *one per cent.* monthly,

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(17) In fee-simple, or fee-tail, in possession of an annual value equal to the annuity.

(18) The consideration may either be in money or notes, if they are paid when they become due, but they must be specified in the memorial. 3 *T. R.* 298. But bank-notes are considered in this case as money. *Ib.* 554. The grant of the annuity will be void if the consideration is partly money, and partly a debt for the sale of goods; for one great abuse intended to be corrected by the statute was a pretended advance of money by a fraudulent sale of goods. 1 *T. R.* 732.

Perhaps a debt for money lent would be a sufficient consideration within the spirit of the statute, yet it would be prudent not to trust to it. But annuities granted without a pecuniary consideration, as in consideration of the grantee's resigning his business in favour of the grantor, are excepted in the statute, and need not be registered. 4 *T. R.* 790.

or *twelve per cent. per annum*, to be taken for common loans; but Juſtinian [m] reduced it to *trientes*, or one third of the *as* or *centeſimae*, that is, *four per cent*; but allowed higher intereſt to be taken of merchants, becauſe there the hazard was greater. So too Grotius in-

[m] *Cod.* 4. 32. 26. *Nov.* 33, 34, 35.——A ſhort explication of theſe terms, and of the diviſion of the Roman *as*, will be uſeful to the ſtudent, not only for underſtanding the civilians, but alſo the more claſſical writers, who perpetually refer to this diſtribution. Thus Horace, *ad Piſones*, 325.

> *Romani pueri longis rationibus* aſſem
> *Diſcunt in partes* centum *diducere. Dicat*
> *Filius Albini, ſi de* quincunce *remota eſt*
> Uncia, *quid ſuperet? poterat dixiſſe,* triens: *eu,*
> *Rem poteris ſervare tuam! redit* uncia, *quid ſit?*
> Semis.———

It is therefore to be obſerved, that in calculating the rate of intereſt, the Romans divided the principal ſum into an *hundred* parts; one of which they allowed to be taken monthly: and this, which was the higheſt rate of intereſt permitted, they called *uſurae centeſimae*, amounting yearly to twelve *per cent.* Now as the *as*, or Roman pound, was commonly uſed to expreſs any integral ſum, and was diviſable into twelve parts or *unciae*, therefore theſe twelve monthly payments or *unciae* were held to amount annually to one pound, or *as uſurarius*; and ſo the *uſurae aſſes* were ſynonymous to the *uſurae centeſimae*. And all lower rates of intereſt were denominated according to the relation they bore to this centeſimal uſury, or *uſurae aſſes*: for the ſeveral multiplies of the *unciae*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *ſextans, quadrans, triens, quincunx, ſemis, ſeptunx, bes, dodrans, dextans, deunx*, containing reſpectively, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, *unciae* or duodecimal parts of an *as*. (*Ff.* 28. 5. 50. § 2. Gravin. *orig. jur. civ. l.* 2. § 47.) This being premiſed, the following table will clearly exhibit at once the ſubdiviſions of the *as*, and the denominations of the rate of intereſt.

USURAE.	PARTES ASSIS.	PER ANNUM.
Aſſes, ſive centeſimae	*integer*	12 *per cent.*
Deunces	$\frac{11}{12}$	11
Dextances, vel decunces	$\frac{5}{6}$	10
Dodrantes	$\frac{3}{4}$	9
Beſſes	$\frac{2}{3}$	8
Septunces	$\frac{7}{12}$	7
Semiſſes	$\frac{1}{2}$	6
Quincunces	$\frac{5}{12}$	5
Trientes	$\frac{1}{3}$	4
Quadrantes	$\frac{1}{4}$	3
Sextances	$\frac{1}{6}$	2
Unciae	$\frac{1}{12}$	1

forms

forms us[n], that in Holland the rate of intereſt was then eight *per cent.* in common loans, but twelve to merchants. And lord Bacon was deſirous of introducing a ſimilar policy in England[o]: but our law eſtabliſhes one ſtandard for all alike, where the pledge of ſecurity itſelf is not put in jeopardy; leſt, under the general pretence of vague and indeterminate hazards, a door ſhould be opened to fraud and uſury: leaving ſpecific hazards to be provided againſt by ſpecific inſurances, by annuities for lives, or by loans upon *reſpondentia*, or bottomry. But as to the rate of legal intereſt, it has varied and decreaſed for two hundred years paſt, according as the quantity of ſpecie in the kingdom has increaſed by acceſſions of trade, the introduction of paper credit, and other circumſtances. The ſtatute 37 Hen. VIII. c. 9. confined intereſt to ten *per cent.* and ſo did the ſtatute 13 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, ſo under her ſucceſſor the ſtatute 21 Jac. I. c. 17. reduced it to eight *per cent*; as did the ſtatute 12 Car. II. c. 13. to ſix: and laſtly by the ſtatute 12 Ann. ſt. 2. c. 16. it was brought down to five *per cent.* yearly, which is now the extremity of legal intereſt that can be taken (19). But yet, if a contract which carries intereſt be made in a foreign country, our courts will direct the payment of intereſt according to the law of that country in which the contract was made[p].

n *de jur. b. & p.* 2. 12. 22.
o Eſſays. c. 41.
p 1 Equ. Caſ. abr. 289. 1 P. Wms. 395.

(19) This ſtatute not only makes the lender liable to a penalty of treble the amount of the ſum lent, but it declares all uſurious bonds, contracts, and aſſurances, abſolutely void. If therefore a bill of exchange, or note, is given in conſequence of an uſurious contract, it is abſolutely void in the hands of an innocent perſon, who has taken it in the fair and regular courſe of buſineſs, without any notice of the uſury; and evidence of the uſury will be a good defence, in an action brought upon ſuch a bill or note, againſt the drawer, acceptor, or any indorſer. This is a very hard caſe; and the law is the ſame if a bill or note is given for a gaming debt, or for money lent to game with. *Doug.* 708. See further upon uſury in the 4th vol. p. 158.

Thus Iriſh, American, Turkiſh, and Indian intereſt, have been allowed in our courts to the amount of even twelve *per cent*: for the moderation or exorbitance of intereſt depends upon local circumſtances; and the refuſal to inforce ſuch contracts would put a ſtop to all foreign trade. And, by ſtatute 14 Geo. III. c. 79. all mortgages and other ſecurities upon eſtates, or other property in Ireland or the plantations, bearing intereſt not exceeding ſix *per cent.* ſhall be legal; though executed in the kingdom of Great Britain: unleſs the money lent ſhall be known at the time to exceed the value of the thing in pledge; in which caſe alſo, to prevent uſurious contracts at home under colour of ſuch foreign ſecurities, the borrower ſhall forfeit treble the ſum ſo borrowed.

4. THE laſt general ſpecies of contracts, which I have to mention, is that of *debt*; whereby a *choſe* in action, or right to a certain ſum of money, is mutually acquired and loſt [q]. This may be the counterpart of, and ariſe from, any of the other ſpecies of contracts. As, in caſe of a ſale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the ſum agreed on; and the vendor has a property in this price, as a *choſe* in action, by means of this contract of debt. In bailment, if the bailee loſes or detains a ſum of money bailed to him for any ſpecial purpoſe, he becomes indebted to the bailor in the ſame numerical ſum, upon his implied contract, that he ſhould execute the truſt repoſed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the ſame time that he acquires a property in the thing lent, may alſo become indebted to the lender, upon his contract to reſtore the money borrowed, to pay the price or premium of the loan, the hire of the horſe, or the like. Any contract in ſhort whereby a determinate ſum of money becomes due to any perſon, and is not paid but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquiſi-

[q] F. N. B. 119.

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tion; being uſually divided into debts of *record*, debts by *ſpecial*, and debts by *ſimple* contract.

A DEBT of *record* is a ſum of money, which appears to be due by the evidence of a court of record. Thus, when any ſpecific ſum is adjudged to be due from the defendant to the plaintiff, on an action or ſuit at law; this is a contract of the higheſt nature, being eſtabliſhed by the ſentence of a court of judicature. Debts upon recognizance are alſo a ſum of money, recognized or acknowleged to be due to the crown or a ſubject, in the preſence of ſome court or magiſtrate, with a condition that ſuch acknowlegement ſhall be void upon the appearance of the party, his good behaviour, or the like: and theſe, together with ſtatutes merchant and ſtatutes ſtaple, &c. if forfeited by non-performance of the condition, are alſo ranked among this firſt and principal claſs of debts, *viz.* debts of record; ſince the contract, on which they are founded, is witneſſed by the higheſt kind of evidence, *viz.* by matter of record.

DEBTS by *ſpecialty*, or ſpecial contract, are ſuch whereby a ſum of money becomes, or is acknowleged to be, due by deed or inſtrument under ſeal. Such as by deed of covenant, by deed of ſale, by leaſe reſerving rent, or by bond or obligation: which laſt we took occaſion to explain in the twentieth chapter of the preſent book; and then ſhewed that it is a creation or acknowlegement of a debt from the obligor to the obligee, unleſs the obligor performs a condition thereunto uſually annexed, as the payment of rent or money borrowed, the obſervance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. Theſe are looked upon as the next claſs of debts after thoſe of record, being confirmed by ſpecial evidence, under ſeal.

DEBTS by *ſimple contract* are ſuch, where the contract upon which the obligation ariſes is neither aſcertained by matter of record, nor yet by deed or ſpecial inſtrument, but

by mere oral evidence, the moſt ſimple of any; or by notes unſealed, which are capable of a more eaſy proof, and (therefore only) better, than a verbal promiſe. It is eaſy to ſee into what a vaſt variety of obligations this laſt claſs may be branched out, through the numerous contracts for money, which are not only expreſſed by the parties, but virtually implied in law. Some of theſe we have already occaſionally hinted at; and the reſt, to avoid repetition, muſt be referred to thoſe particular heads in the third book of theſe commentaries, where the breach of ſuch contracts will be conſidered. I ſhall only obſerve at preſent, that by the ſtatute 29 Car. II. c. 3. no executor or adminiſtrator ſhall be charged upon any ſpecial promiſe to anſwer damages out of his own eſtate, and no perſon ſhall be charged upon any promiſe to anſwer for the debt or default of another, or upon any agreement in conſideration of marriage, or upon any contract or ſale of any real eſtate, or upon any agreement that is not to be performed within one year from the making; unleſs the agreement or ſome memorandum thereof be in writing, and ſigned by the party himſelf or by his authority (20).

BUT there is one ſpecies of debts upon ſimple contract, which, being a tranſaction now introduced into all ſorts of civil life, under the name of *paper credit*, deſerves a more particular regard. Theſe are debts by *bills of exchange*, and *promiſſory notes*.

A BILL *of exchange* is a ſecurity, originally invented among merchants in different countries, for the more eaſy remittance of money from the one to the other, which has ſince ſpread itſelf into almoſt all pecuniary tranſactions. It is an open letter of requeſt from one man to another, deſiring him to pay a ſum named therein to a third perſon on his account: by which means a man at the moſt diſtant part of the world may have money remitted to him from any trading country.

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(20) See 3 vol. page 159.

If A lives in Jamaica, and owes B who lives in England 1000*l.* now if C be going from England to Jamaica, he may pay B this 1000*l.* and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any diſtance of place, by transferring it to C; who carries over his money in paper credit, without danger of robbery or loſs. This [467] method is ſaid to have been brought into general uſe by the Jews and Lombards, when baniſhed for their uſury and other vices; in order the more eaſily to draw their effects out of France and England, into thoſe countries in which they had choſen to reſide. But the invention of it was a little earlier: for the Jews were baniſhed out of Guienne in 1287, and out of England in 1290[r]; and in 1236 the uſe of paper credit was introduced into the Mogul empire in China[s]. In common ſpeech ſuch a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expreſſion. The perſon however, who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee*; and the third perſon, or negotiator, to whom it is payable (whether ſpecially named, or the *bearer* generally) is called the *payee*.

THESE bills are either *foreign*, or *inland*; *foreign*, when drawn by a merchant reſiding abroad upon his correſpondent in England, or *vice verſa*; and *inland*, when both the drawer and the drawee reſide within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two ſtatutes, the one 9 & 10 W. III. c. 17. the other 3 & 4 Ann. c. 9. inland bills of exchange are put upon the ſame footing as foreign ones; what was the law and cuſtom of merchants with regard to the one, and taken notice of merely as ſuch[t], being by thoſe ſtatutes expreſly enacted

[r] 2 Carte. Hiſt. Engl. 203. 206.

[s] Mod. Un. Hiſt. iv. 499.

[t] 1 Roll. Abr. 6.

with regard to the other. So that now there is not in law any manner of difference between them (21).

PROMISSORY notes, or notes of hand, are a plain and direct engagement in writing, to pay a ſum ſpecified at the time therein limited to a perſon therein named, or ſometimes to his order, or often to the bearer at large. Theſe alſo, by the ſame ſtatute 3 & 4 Ann. c. 9. are made aſſignable and indorſable in like manner as bills of exchange. But, by ſtatute 15 Geo. III. c. 51. all promiſſory or other notes,
[468] bills of exchange, drafts, and undertakings in writing, being negotiable or transferable, for the payment of leſs than twenty ſhillings, are declared to be null and void; and it is made penal to utter or publiſh any ſuch; they being deemed prejudicial to trade and public credit. And, by 17 Geo. III. c. 30. all ſuch notes, bills, drafts, and undertakings, to the amount of twenty ſhillings, and leſs than five pounds, are ſubjected to many other regulations and formalities; the omiſſion of any one of which vacates the ſecurity, and is penal to him that utters it (22).

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(21) One very important diſtinction between foreign and inland bills of exchange ſtill remains unaltered by the ſtatutes; *viz.* in a foreign bill, in order to recover againſt the drawer or indorſers, it is neceſſary that the bill ſhould be proteſted for non-acceptance or non-payment, 5 *T. R.* 239; but a proteſt is not neceſſary upon an inland bill, to enable the holder to recover the amount of it againſt the drawer or indorſers; and the only advantage of a proteſt upon an inland bill is to give the holder a right to recover intereſt and expences incurred by the non-acceptance or non-payment. *Ld. Raym.* 993. No inland bill, payable at or after ſight, can be proteſted; or which is not drawn payable at ſome time after date. 4 *T. R.* 170.

(22) Every note or bill of that value ſhall ſpecify the name and place of abode of the payee; it ſhall not be antedated, and ſhall be made payable within twenty-one days after date; and every indorſement ſhall be made within that time, and ſhall be dated when and where made, and ſhall contain the name and place of abode of the

THE payee, we may obſerve, either of a bill of exchange or promiſſory note, has clearly a property veſted in him (not indeed in poſſeſſion but in action) by the *expreſs* contract of the drawer in the caſe of a promiſſory note, and, in the caſe of a bill of exchange, by his *implied* contract, *viz.* that, provided the drawee does not pay the bill, the drawer will: for which reaſon it is uſual, in bills of exchange, to expreſs that the *value* thereof hath been *received* by the drawer [u]; in order to ſhew the conſideration, upon which the implied contract of repayment ariſes. And this property, ſo veſted, may be transferred and aſſigned from the payee to any other man; contrary to the general rule of the common law, that no *choſe* in action is aſſignable: which aſſignment is the life of paper credit. It may therefore be of ſome uſe, to mention a few of the principal incidents attending this transfer or aſſignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other perſons than thoſe with whom he originally contracted.

[u] Stra. 1212.

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the indorſee. The penalty for not complying with the ſtatute is from 5 to 20*l.* at the diſcretion of a magiſtrate.

The following ſtamp duties are now payable upon all bills of exchange and promiſſory notes: upon all bills of exchange payable on demand, and promiſſory notes payable to bearer on demand, for 5*l.* 5*s.* and under, 3*d.*; for 30*l.* and under, above the laſt ſum, 6*d.*; for 50*l.* and under, 9*d.*; for 100*l.* and under, 1*s.*; for 200*l.* and under, 1*s.* 6*d.*; theſe may be re-iſſued at the place where drawn. But ſuch bills or notes paying for 5*l.* 5*s.* or under, 6*d.* and for 30*l.* and under, above 5*l.* 5*s.* one ſhilling, may be re-iſſued after payment at one place. For all other bills and notes the following duties muſt be paid: for 30*l.* and under, 6*d.*; for 50*l.* and under, above the laſt ſum, 9*d.*; for 100*l.* and under, 1*s.*; for 200*l.* and under, 1*s.* 6*d.* Every bill and note above 200*l.* ſhall pay 2*s.* No duty is to be paid upon bills or notes for leſs than 40*s.*; nor upon any draft on demand upon bankers living within ten miles of the place where drawn. All foreign bills ſhall pay for each ſet, for 100*l.* and under, 6*d.*; for 200*l.* to 100*l.* ninepence; above 200*l.* one ſhilling. 31 Geo. III. c. 25. *Burn. Prom. Note.*

IN the first place then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by indorsement, or writing his name in *dorso* or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to [469] another, and so on *in infinitum*. And a promissory note, payable to A or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it [v]. But, in case of a bill of exchange, the payee, or the indorsee, (whether it be a general or particular indorsement) is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill (23). If the drawee accepts the bill, either verbally or in writing [w], he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowlegement that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the payee or indorsee may protest it for *non-acceptance*; which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after (24), be given to the drawer.

v 2 Show. 235.—Grant v. Vaughan. T. 4 Geo. III. B. R.

w Stra. 1000.

(23) It is fully settled, that a verbal acceptance will bind the drawee. *Str.* 1000. Yet it appears from the statutes, which are very far from being so intelligible as the importance of the subject demanded, that if the drawee refuses to accept in writing, the bill may be protested for non-acceptance. 3 & 4 Ann. c. 9. f. 4. But if a verbal acceptance is received by the holder, the bill cannot afterwards be protested for non-payment, so as to charge the drawer with costs, damages, and interest, in consequence of the protest. f. 5.

(24) See note 26.

BUT,

BUT, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (25), (which three days are called days of grace) the payee or indorsee is then to get it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of non-acceptance or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills, (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law[x]) but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, [470] when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid: since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee[y] (26).

x Lord Raym. 993.

y Salk. 127.

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(25) A bill or note is not now considered due or demandable till the last day of the three days grace; as if a bill or note is dated on the 12th of any month, and made payable ten days, one week, or one month after date, payment must be demanded on the 25th, the 22d of the same, and on the 15th of the next month respectively. Days of grace are allowed upon promissory notes, in like manner as upon bills of exchange. 4 *T. R.* 148.

(26) It is probable, when the statute 9 & 10 W. III. c. 17. was passed, which requires notice of a protest to be sent within fourteen days,

IF the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or if the bill has been negociated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser has nobody to resort to, but the drawer only (27).

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days, that such time was thought a reasonable notice of the bill's being dishonoured; but it is now fully settled, that if the holder of a bill intends to have his remedy against the drawer or indorser, he must give him notice without delay of the non-acceptance or non-payment, and that he expects payment from him. It used to be held, that the reasonableness of the notice was a question of fact for the jury to determine; but it is now so far a question of law, that the courts will grant new trials till the jury adopt the rule which they have established: which seems to be this, *viz.* that notice must be given to the drawer or indorser, by the first or next post, if the time will permit, after the dishonour of the bill. 1 *T. R.* 168. *Doug.* 497. It might perhaps be more convenient to extend the rule till the post goes out on the next day, as this would cut off all questions and litigation upon the possibility of giving notice on the same day. The drawer and indorsers are discharged, without such due notice, from all actions brought upon the bill; with this exception, if the holder can prove that the drawer had no effects in the hands of the drawee when the bill was dishonoured, he may still recover against the drawer, though he omitted to give him notice. For the intent of the notice is to give him the earliest opportunity of regaining his property out of the hands of the drawee; and he can sustain no possible injury by the want of notice, when he has no property in the drawee's possession. 1 *T. R.* 712. But this reason does not extend to an indorser; and therefore the circumstance of the drawee's having no effects is immaterial in an action against him. *Ib.*

(27) The holder of the bill may bring actions against the acceptor, drawer, and all the indorsers at the same time; but though he may obtain

WHAT has been ſaid of bills of exchange is applicable alſo to promiſſory notes, that are indorſed over, and negociated from one hand to another; only that, in this caſe, as there is no drawee, there can be no proteſt for non-acceptance; or rather, the law conſiders a promiſſory note in the light of a bill drawn by a man upon himſelf, and accepted at the time of drawing. And, in caſe of non-payment by the drawer, the ſeveral indorſees of a promiſſory note have the ſame remedy, as upon bills of exchange, againſt the prior indorſers.

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obtain judgments in all the actions, yet he can recover but one ſatisfaction for the value of the bill; but he may ſue out execution againſt all the reſt for the coſts of their reſpective actions. *Bayley*, 43.

This important ſubject will be more fully diſcuſſed by the Editor upon a future occaſion.

CHAPTER THE THIRTY-FIRST.

OF TITLE BY BANKRUPTCY.

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. BANKRUPTCY; a title which we before lightly touched upon[a], so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us therefore first of all consider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* on a commission of bankrupt: and, 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.

1. WHO may become a bankrupt. A bankrupt was before[b] defined to be "a trader, who secretes himself, or does "certain other acts, tending to defraud his creditors." He was formerly considered merely in the light of a criminal or offender[c]; (1) and in this spirit we are told by sir Edward Coke[d],

a See page 285.
b *Ibid.*
c Stat. 1. Jac. I. c. 15. § 17.
d 4 Inst. 277.

(1) Throughout the three first statutes the bankrupt is uniformly called an offender, and the original design of the bankrupt laws

that we have fetched as well the name, as the wickedneſs, of bankrupts from foreign nations [e]. But at preſent the laws [472] of bankruptcy are conſidered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as juſtice; and to that end they confer ſome privileges, not only on the creditors, but alſo on the bankrupt or debtor himſelf. On the creditors; by compelling the bankrupt to give up all his effects to their uſe, without any fraudulent concealment: on the debtor; by exempting him from the rigor of the general law, whereby his perſon might be confined at the diſcretion of his creditor, though in reality he has nothing to ſatiſfy the debt: whereas the law of bankrupts, taking into conſideration the ſudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their perſons, and ſome pecuniary emoluments,

[e] The word itſelf is derived from the word *bancus* or *banque*, which ſignifies the table or counter of a tradeſman, (Dufreſne. I. 969.) and *ruptus*, broken; denoting thereby one whoſe ſhop or place of trade is broken and gone; though others rather chooſe to adopt the word *route*, which in French ſignifies a trace or track, and tell us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inſt. 277.) And it is obſervable that the title of the firſt Engliſh ſtatute concerning this offence, 34 Hen. VIII. c. 4. "againſt "ſuch perſons as do make bankrupt," is a literal tranſlation of the French idiom, *qui ſont banque route.*

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laws appears to have been to prevent and defeat the frauds of criminal debtors; for the 34 & 35 Hen. VIII. c. 4, the firſt bankrupt ſtatute, begins with this preamble—"Whereas divers and ſundry perſons "craftily obtaining into their hands great ſubſtance of other men's "goods, do ſuddenly flee to parts unknown, or keep their houſes, not "minding to pay or reſtore to any their creditors their debts and "duties, but at their own wills and pleaſures conſume the ſub- "ſtance obtained by credit of other men, for their own pleaſure and "delicate living, againſt all reaſon, equity, and good conſcience." The bankrupt being deemed an offender, and being completely diveſted of the diſpoſition of his property, theſe ſtatutes at the firſt would naturally be conſidered penal ſtatutes; for this reaſon I preſume the 21 Jac. I. c. 19. begins by declaring that "the afore- "ſaid ſtatutes ſhall be largely and beneficially conſtrued and ex- "pounded for the aid and relief of the creditors."

upon

upon condition they ſurrender up their whole eſtate to be divided among their creditors.

IN this reſpect our legiſlature ſeems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable ſhare: if indeed that law, *de debitore in partes ſecando*, is to be underſtood in ſo very butcherly a light; which many learned men have with reaſon doubted [f]. Nor do I mean thoſe leſs inhuman laws (if they may be called ſo, as *their* meaning is indiſputably certain) of impriſoning the debtor's perſon in chains; ſubjecting him to ſtripes and hard labour, at the mercy of his rigid creditor; and ſometimes ſelling him, his wife, and children, to perpetual foreign ſlavery *trans Tiberim* [g]: an oppreſſion which produced ſo many
[473] popular inſurrections, and ſeceſſions to the *mons ſacer*. But I mean the law of *ceſſion*, introduced by the chriſtian emperors; whereby, if a debtor *ceded*, or yielded up all his fortune to his creditors, he was ſecured from being dragged to a gaol, "*omni quoque corporali cruciatu ſemoto* [h]." For, as the emperor juſtly obſerves [i], "*inhumanum erat ſpoliatum fortunis* "*ſuis in ſolidum damnari*." Thus far was juſt and reaſonable: but, as the departing from one extreme is apt to produce it's oppoſite, we find it afterwards enacted [k], that if the debtor by any unforeſeen accident was reduced to low circumſtances, and would *ſwear* that he had not ſufficient left to pay his debts, he ſhould not be compelled to cede or give up even that which he had in his poſſeſſion: a law, which under a falſe notion of humanity, ſeems to be fertile of perjury, injuſtice, and abſurdity.

[f] Taylor. *Comment. in L. decemviral.* Bynkerſh. *Obſerv. Jur. I.* 1. Heinecc. *Antiq. III.* 30. 4.

[g] In Pegu and the adjacent countries in Eaſt India, the creditor is entitled to diſpoſe of the debtor himſelf, and likewiſe of his wife and children; inſomuch that he may even violate with impunity the chaſtity of the debtor's wife: but then, by ſo doing, the debt is underſtood to be diſcharged. (Mod. Un. Hiſt. vii. 128.)

[h] *Cod.* 7. 71. *per tot.*

[i] *Inſt.* 4. 6. 40.

[k] *Nov.* 135. *c.* 1.

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THE laws of England, more wifely, have fteered in the middle between both extremes: providing at once againft the inhumanity of the creditor, who is not fuffered to confine an honeft bankrupt after his effects are delivered up; and at the fame time taking care that all his juft debts fhall be paid, fo far as the effects will extend. But ftill they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders*; fince that fet of men are, generally fpeaking, the only perfons liable to accidental loffes, and to an inability of paying their debts, without any fault of their own. If perfons in other fituations of life run in debt without the power of payment, they muft take the confequences of their own indifcretion, even though they meet with fudden accidents that may reduce their fortunes: for the law holds it to be an unjuftifiable practice, for any perfon but a trader to encumber himfelf with debts of any confiderable value. If a gentleman, or one in a liberal profeffion, at the time of contracting his debts, [474]
has a fufficient fund to pay them, the delay of payment is a fpecies of difhonefty, and a temporary injuftice to his creditor: and if, at fuch time, he has no fufficient fund, the difhonefty and injuftice is the greater. He cannot therefore murmur, if he fuffers the punifhment which he has voluntarily drawn upon himfelf. But in mercantile tranfactions the cafe is far otherwife. Trade cannot be carried on without mutual credit on both fides: the contracting of debts is therefore here not only juftifiable, but neceffary. And if by accidental calamities, as by the lofs of a fhip in a tempeft, the failure of brother traders, or by the non-payment of perfons out of trade, a merchant or trader becomes incapable of difcharging his own debts, it is his misfortune and not his fault. To the misfortunes therefore of debtors, the law has given a compaffionate remedy, but denied it to their faults: fince, at the fame time that it provides for the fecurity of commerce, by enacting that every confiderable trader may be declared a bankrupt, for the benefit of his creditors as well as himfelf, it has alfo (to difcourage extravagance) declared that no one

ſhall be capable of being made a bankrupt, but only a *trader:* nor capable of receiving the full benefit of the ſtatutes, but only an *induſtrious* trader.

THE firſt ſtatute made concerning any Engliſh bankrupts, was 34 Hen. VIII. c. 4. when trade began firſt to be properly cultivated in England (2): which has been almoſt totally altered by ſtatute 13 Eliz. c. 7. whereby bankruptcy is confined to ſuch perſons only as have *uſed the trade of merchandize,* in groſs or by retail, by way of bargaining, exchange, rechange, bartering, cheviſance[1], or otherwiſe; or have *ſought their living by buying and ſelling.* And by ſtatute 21 Jac. I. c. 19. perſons uſing the trade or profeſſion of a *ſcrivener,* receiving other mens monies and eſtates into their truſt and cuſtody, are alſo made liable to the ſtatutes of bankruptcy: and the benefits, as well as the penal parts of the law, are ex-
[475] tended as well to *aliens* and *denizens* as to natural-born ſubjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives (3). By

[1] that is, making contracts. (Dufreſne. II. 569.)

(2) But that ſtatute extended to perſons of every denomination who came under the deſcription of the preamble, which ſee in the preceding note (1). By that ſtatute the chief officers of ſtate, the chief juſtices, the privy council, or three of them at the leaſt, had the authority which is now given to the commiſſioners of bankrupt, to diſtribute the bankrupt's property among his creditors. It is ſomething remarkable, that, although the ſubſequent ſtatutes deſcribe what traders ſhall be bankrupts, and the conduct which renders them ſubject to the bankrupt laws, and give commiſſioners appointed by the chancellor authority over *ſuch perſons,* yet I have no where found any negative words, or words to repeal this ſtat. of Hen. VIII. The authority in that ſtatute is left to the diſcretion of the high perſons therein named; and as the object was ſuppoſed, as I conceive, to have been ſufficiently anſwered by the ſubſequent ſtatutes, it fell into entire diſuſe.

(3) Any perſon, whether native, denizen, or alien, who trades to England, although he never reſides here as a trader, may be a bankrupt, if he ſhould come to England and commit an act of bankruptcy whilſt he is here. *Cowp.* 398.

many subsequent statutes, but lastly by statute 5 Geo. II. c. 30. [m] *bankers, brokers,* and *factors,* are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I. *viz.* for the relief of their creditors; whom they have otherwise more opportunities of defrauding than any other set of dealers: and they are properly to be looked upon as traders, since they make merchandize of money, in the same manner as other merchants do of goods and other moveable chattels. But by the same act [n], no *farmer, grazier,* or *drover,* shall (as such) be liable to be deemed a bankrupt(4): for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of it's produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others, for the payment of their reserved rents; wherefore also, upon a similar reason, a *receiver of the king's taxes* is not capable [o], as such, of being a bankrupt; lest the king should be defeated of those

m § 39. n § 40. o § *eod.*

(4) Although a farmer, grazier, and drover, cannot from their respective occupations alone be bankrupts, yet if they buy and sell, or are dealers, independently of these characters, they become, like other traders, subject to the bankrupt laws: as, one farmer was declared a bankrupt, who bought large quantities of potatoes, not for planting or consuming upon his farm, but for selling again for profit, 1 *Str.* 513: and another, who occasionally bought horses, not for the use of his farm, but to make a profit of by reselling. 1 *T. R.* 517. A farmer, who makes upon his farm bricks for sale, from earth not taken from the farm, may be a bankrupt. 1 *Bro.* 173. But where a man rented a farm, wherein there was a brick-ground, upon which he dug the clay and manufactured bricks for sale, the court of common pleas decided he could not be a bankrupt; but this judgment was afterwards reversed by the court of king's bench. 1 *T. R.* 32. *Cooke,* 52. 3d Edit.

extenſive remedies againſt his debtors, which are put into his hands by the prerogative. By the ſame ſtatute [p], no perſon ſhall have a commiſſion of bankrupt awarded againſt him, unleſs at the petition of ſome *one* creditor, to whom he owes 100*l*; or of *two*, to whom he is indebted 150*l*; or of *more*, to whom all together he is indebted 200*l*. For the law does not look upon perſons, whoſe debts amount to leſs, to be traders conſiderable enough, either to enjoy the benefit of the ſtatute themſelves, or to entitle the creditors, for the benefit of public commerce, to demand the diſtribution of their effects.

[476] IN the interpretation of theſe ſeveral ſtatutes, it hath been held, that buying only, or ſelling only, will not qualify a man to be a bankrupt; but it muſt be both buying and ſelling, and alſo getting a livelyhood by it. As, by exerciſing the calling of a merchant, a grocer, a mercer, or in one general word, a *chapman*, who is one that buys and ſells any thing. But no handicraft occupation (where nothing is bought and ſold, and where therefore an extenſive credit, for the ſtock in trade, is not neceſſary to be had) will make a man a regular bankrupt; as that of a huſbandman, a gardener, and the like, who are paid for their work and labour [q]. Alſo an inn-keeper cannot, as ſuch, be a bankrupt [r] (5): for his gain or livelyhood does not ariſe from buying and ſelling in the way of merchandize, but greatly from the uſe of his rooms and furniture, his attendance and the like: and though he may buy corn and victuals, to ſell again at a profit, yet that no more makes him a trader, than a ſchoolmaſter or other perſon is, that keeps a boarding houſe, and makes conſiderable gains

p § 23.
q Cro. Car. 31.
r Cro. Car. 549. Skinn. 29.

(5) An inn-keeper may be a bankrupt, if he ſell liquor out of his houſe to all perſons who ſend for it, however inconſiderable the quantity, or ſmall his profit. 1 *T. R.* 517. And by this ſpecies of dealing, it is probable that all inn-keepers are now traders, and liable to be made bankrupts.

by

by buying and ſelling what he ſpends in the houſe; and ſuch a one is clearly not within the ſtatutes[s]. But where perſons buy goods, and make them up into ſaleable commodities, as ſhoe-makers, ſmiths, and the like; here, though part of the gain is by bodily labour, and not by buying and ſelling, yet they are within the ſtatutes of bankrupts[t]: for the labour is only in melioration of the commodity, and rendering it more fit for ſale.

ONE ſingle act of buying and ſelling will not make a man a trader; but a repeated practice, and profit by it. Buying and ſelling bank-ſtock, or other government ſecurities, will not make a man a bankrupt; they not being goods, wares, or merchandize, within the intent of the ſtatute, by which a profit may be fairly made[u]. Neither will buying and ſelling under particular reſtraints, or for particular purpoſes; as if a commiſſioner of the navy uſes to buy victuals for the fleet, [477]
and diſpoſe of the ſurplus and refuſe, he is not thereby made a trader within the ſtatutes[w]. An infant, though a trader, cannot be made a bankrupt: for an infant can owe nothing but for neceſſaries; and the ſtatutes of bankruptcy create no new debts, but only give a ſpeedier and more effectual remedy for recovering ſuch as were before due: and no perſon can be made a brankrupt for debts, which he is not liable at law to pay[x]. But a feme covert in London, being a ſole trader according to the cuſtom, is liable to a commiſſion of bankrupt[y] (6).

[s] Skinn. 292. 3 Mod. 330.
[t] Cro. Car. 31. Skinn. 292.
[u] 2 P. Wms. 308.
[w] 1 Sak. 110. Skinn. 292.
[x] Lord Raym. 443.
[y] *La Vie* v. *Philips*, M. 6 Geo. III. B. R.

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(6) But if a ſingle woman carries on a trade and commits an act of bankruptcy, ſhe cannot after marriage be made a bankrupt. *Cooke*, 40. Where a married woman lives apart from her huſband, under articles of ſeparation, with a ſeparate maintenance, as ſhe is competent to contract, and liable to be ſued and taken in execution for her debts as a *feme ſole*, if ſhe becomes a trader, it is reaſonable,

 and

2. HAVING thus conſidered, who may, and who may not be made a bankrupt, we are to inquire, ſecondly, by what *acts* a man may become a bankrupt. A bankrupt is a "trader, who ſecretes himſelf, or does certain other acts, "tending to defraud his creditors." We have hitherto been employed in explaining the former part of this deſcription, "a trader;" let us now attend to the latter, "who ſecretes "himſelf, or does certain other acts tending to defraud his "creditors." And, in general, whenever ſuch a trader, as is before deſcribed, hath endeavoured to avoid his creditors, or evade their juſt demands, this hath been declared by the legiſlature to be an act of bankruptcy, upon which a commiſſion may be ſued out. For in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whoſe circumſtances are declining, in the firſt inſtance, or at leaſt as early as poſſible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly waſting his ſubſtance, and then claim the benefit of the ſtatutes, when he has nothing left to diſtribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we muſt conſult the ſeveral ſtatutes, and the reſolutions formed by the courts thereon.
[478] Among theſe may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himſelf from the juriſdiction and coercion of the law, with intent to d fraud his creditors[z] (7). 2. Departing from his own houſe, w th intent

[z] Stat. 13 Eliz. c. 7.

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and agreeable to principles, that ſhe ſhould be ſubject to the bankrupt laws. *Cooke*, 30. 3d Ed.

(7) It ſeems to be determined, that if a trader departs the realm, whatever may be his reaſon for it, and if in his abſence any of his creditors are denied payment of their debts, it is an act of bankruptcy. *Cooke*, 92. This, to ſay no more of it, is a harſh conſtruction: if then a merchant is under the neceſſity of going abroad, he muſt be very careful to arrange his affairs in ſuch a manner, that

all

to fecrete himfelf, and avoid his creditors[a]. 3. Keeping in his own houfe, privately, fo as not to be feen or fpoken with by his creditors, except for juft and neceffary caufe; which is likewife conftrued to be an intention to defraud his creditors, by avoiding the procefs of the law[b] (8). 4. Procuring or fuffering himfelf willingly to be arrefted, or outlawed, or imprifoned, without juft and lawful caufe; which is likewife deemed an attempt to defraud his creditors[c]. 5. Procuring his money, goods, chattels, and effects to be attached or fequeftered by any legal procefs; which is another plain and direct endeavour to difappoint his creditors of their fecurity[d] (9). 6. Making any fraudulent conveyance to a friend, or

[a] Stat. 1 Jac. I. c. 15.
[b] *Ibid.* 13 Eliz. c. 7.
[c] Stat. 1 Jac. I. c. 15.
[d] *Ibid.*

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all the demands of his creditors during his abfence may be inftantly fatisfied.

(8) A denial that the trader is at home, when in fact he is, by his order or approbation, to a creditor or his fervant, who comes to demand payment of a debt, is *primâ facie*, and is gnerally admitted, evidence of this act of bankruptcy; yet if the denial were made not to delay payment, but for fome other caufe, as ficknefs, company, bufinefs, or the unfeafonablenefs of the hour, it does not amount to an act of bankruptcy. All the acts of bankruptcy being voluntary acts in the bankrupt, except lying in prifon for two months, or neglecting to make fatisfaction within the fame time after fervice of legal procefs, where the trader has privilege of parliament, which acts of bankruptcy may be compulfory and unavoidable; the confequence is, that moft bankruptcies are previoufly concerted by the trader and fome of his creditors: yet it is held, if any creditor, who has concerted the bankruptcy with the trader, comes or fends for payment, and a denial is made, this is not an act of bankruptcy; for the trader cannot be faid to keep houfe to delay a creditor, who fends not for payment, but for refufal of payment. But if any other creditor, who is not privy to this agreement and defign, fends for payment, and a denial is made, this is a complete act of bankruptcy. *Cooke*, 93.

(9) A fraudulent judgment and execution, though void againft creditors, do not conftitute an act of bankruptcy; the words in the

 ftatute

ſecret truſtee, of his lands, tenements, goods, or chattels; which is an act of the ſame ſuſpicious nature with the laſt[e] (10). 7. Procuring any protection, not being himſelf privileged by parliament, in order to ſcreen his perſon from arreſts; which alſo is an endeavour to elude the juſtice of the law[f]. 8. Endeavouring or deſiring, by any petition to the king, or bill exhibited in any of the king's courts againſt any creditors, to compel them to take leſs than their juſt debts; or to procraſtinate the time of payment, originally contracted for; which are an acknowlegement of either his poverty or his knavery[g]. 9. Lying in priſon for two months, or more, upon arreſt or other detention for debt, without finding bail, in order to obtain his liberty[h] (11). For the inability to procure bail, ar-

[e] Stat. 1 Jac. I. c. 15.
[f] *Ibid.* 21 Jac. I. c. 19.
[g] Stat. 21 Jac. I. c. 19.
[h] *Ibid.*

ſtatute 1 Jac. I. c. 15. ſignify the peculiar manner of carrying on ſuits in London and ſome other places. *Cowp.* 427.

(10) A fraudulent conveyance or ſale of goods by a trader, is not an act of bankruptcy, unleſs it is by deed. 4 *Burr.* 2478. A grant or aſſignment of all a trader's property is an act of bankruptcy. *Doug.* 282. And even an aſſignment by a trader of all his property in truſt for his creditors, is an act of bankruptcy; unleſs they all concur, being contrary to the policy of the bankrupt laws. But the creditors who are parties, or aſſenting to ſuch an aſſignment, cannot avail themſelves of it, and eſtabliſh it as an act of bankruptcy. *Cooke*, 108. 2 *T. R.* 594. A conveyance by deed of part of the effects, if made in contemplation of bankruptcy, is alſo an act of bankruptcy. *Doug.* 86. But where there is a conveyance without deed, or a payment of money, or any preference is given, although to a *bonâ fide* and meritorious creditor, upon the eve and expectation of bankruptcy, this is a fraud againſt the bankrupt laws, and may after bankruptcy be avoided by the aſſignees, for the benefit of the creditors in general. *Cowp.* 127. 629.

Yet if ſuch a preference to a particular creditor be not given voluntarily, but from an apprehenſion of legal proceſs, it is not fraudulent, and cannot afterwards be vacated. 1 *T. R.* 155.

(11) In this caſe, the act of bankruptcy relates back to the day upon which the arreſt is made. 2 *T. R.* 143. And the legal con-

ſequences

gues a ſtrong deficiency in his credit, owing either to his ſuſpected poverty, or ill character; and his neglect to do it, if able, can ariſe only from a fraudulent intention; in either of which caſes it is high time for his creditors to look to themſelves, and compel a diſtribution of his effects. 10. Eſcaping from priſon after an arreſt for a juſt debt of 100*l*, or upwards [i]. For no man would break priſon that was able and deſirous to procure bail; which brings it within the reaſon of the laſt caſe. 11. Neglecting to make ſatisfaction for any juſt debt to the amount of 100*l*, within two months after ſervice of legal proceſs for ſuch debt, upon any trader having privilege of parliament [k] (12). [479]

THESE are the ſeveral acts of bankruptcy, expreſsly defined by the ſtatutes relating to this title: which being ſo numerous, and the whole law of bankrupts being an innovation on the common law, our courts of juſtice have been tender of extending or multiplying acts of bankruptcy by any conſtruction, or implication (13). And therefore ſir

[i] Stat. 21 Jac. I. c. 19. [k] Stat. 4 Geo. III. c. 33.

ſequences will be the ſame as if the trader had committed any other act of bankruptcy on that day. But if a trader upon being arreſted, puts in bail, and afterwards ſurrenders himſelf in diſcharge of his bail, and lies two months in priſon, the act of bankruptcy is committed on the day of the ſurrender. *Bull. N. P.* 38.

(12) A member of either houſe of parliament who engages in trade, and commits an act of bankruptcy, may be declared a bankrupt, if, within two months after ſervice of proceſs ſued out as deſcribed by the ſtatute, he does not compound or pay the debt, or enter into a bond with two ſureties to be approved of by a judge of the court, to pay the ſum recovered in the action with coſts.

(13) There is one act of bankruptcy beſides thoſe enumerated above by the learned Commentator, viz: If any bankrupt ſhall give or ſecure to the perſon who has ſued out a commiſſion, more in the pound than the other creditors can receive, that commiſſion ſhall be ſuperſeded, and this alone ſhall be an act of bankruptcy to ſupport another commiſſion. 5 *Geo. II. c.* 30. *ſ.* 24. And if a

trader

John Holt held[l], that a man's removing his goods privately to prevent their being ſeized in execution, was no act of bankruptcy. For the ſtatutes mention only fraudulent gifts to third perſons, and procuring them to be ſeized by ſham proceſs in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of thoſe caſes, cannot be adjudged an act of bankruptcy. So alſo it has been determined expreſsly, that a banker's ſtopping or refuſing payment is no act of bankruptcy; for it is not within the deſcription of any of the ſtatutes, and there may be good reaſons for his ſo doing, as ſuſpicion of forgery, and the like: and if, in conſequence of ſuch refuſal, he is arreſted, and puts in bail, ſtill it is no act of bankruptcy[m]: but if he goes to priſon, and lies there two months, then, and not before, he is become a bankrupt (14).

WE have ſeen *who* may be a bankrupt, and what *acts* will make him ſo: let us next conſider,

3. THE *proceedings* on a commiſſion of bankrupt; ſo far as they affect the bankrupt himſelf. And theſe depend en-
[480] tirely on the ſeveral ſtatutes of bankruptcy; all which I ſhall endeavour to blend together, and digeſt into a conciſe methodical order.

AND, firſt, there muſt be a *petition* to the lord chancellor by one creditor to the amount of 100*l*, or by two to the amount of 150*l*, or by three or more to the amount of

l Lord Raym. 725. m 7 Mod. 139.

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trader gives a ſatisfaction to a petitioning creditor, who has ſued out a commiſſion, which induces him not to proſecute it; this is held to be an act of bankruptcy which will ſupport a ſecond commiſſion. *Cooke*, 120.

(14) Bankruptcy and inſolvency, though frequently confounded in common diſcourſe, yet are very different in the conſideration of law. Bankruptcy can happen to no one who is not a trader, and every trader, by committing any of the acts already enumerated, may be a bankrupt, though he may be worth one hundred thouſand pounds after the payment of all his debts; and if a trader or merchant

200*l*; which debts muſt be proved by *affidavit* [n] (15): upon which he grants a *commiſſion* to ſuch diſcreet perſons as to him ſhall ſeem good, who are then ſtiled commiſſioners of bankrupt [o]. The petitioners, to prevent malicious applications, muſt be bound in a ſecurity of 200*l*, to make the party amends in caſe they do not prove him a bankrupt (16).

[n] Stat. 5 Geo. II. c. 30. [o] 3 Stat. 13 Eliz. c. 7.

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chant openly appears in his ſhop or counting-houſe, and tells his creditors, I cannot pay you, or, I will not pay you, no commiſſion can be ſued out againſt him till he has done ſome act which the law denominates an act of bankruptcy.

(15) The petitioning creditor's debt muſt be a legal not an equitable demand, and conſequently the aſſignee of a bond cannot take out a commiſſion. If a debt is due from a partnerſhip, it will be ſufficient to ſupport a ſeparate commiſſion againſt one partner only. The petitioning creditor's debt muſt be contracted, either before the bankrupt began, or before he left off, trade. If a note or bill is drawn before the act of bankruptcy, but indorſed without fraud afterwards, the indorſee has the ſame right to petition for and to prove it under the commiſſion as the original payee. The holders of bonds, bills, notes, and other ſecurities for the payment of money, or in conſideration of goods ſold upon credit, may petition for a commiſſion, before ſuch ſecurities are due, by the 5 *Geo. II. c.* 30. *ſ.* 22. If a creditor has taken his debtor in execution, he cannot afterwards ſue out a commiſſion, for the execution is conſidered in law a ſatisfaction of the debt. It is now held to be neceſſary to ſupport a commiſſion and the proceedings under it, that the petitioning creditor's debt ſhould have exiſted prior to any act of bankruptcy proved. See *Cooke, ch.* ii.

(16) When a creditor intends to take out a commiſſion, he muſt make an affidavit of his debt, and execute a bond to the great ſeal (this is called *ſtriking a docket)*; and if he does not get the commiſſion ſealed within four days, excluſive of the day upon which the docket is ſtruck, any other creditor may ſue out the commiſſion. *Cooke, ch.* i. By a late order of lord chancellor Loughborough, if the commiſſion is to be executed in London, it ſhall be ſuperſedable for want of proſecution at the expiration of fourteen days after the date thereof; and if it is to be executed in the country, at the expiration of twenty-eight days after

And if on the other hand they receive any money or effects from the bankrupt, as a recompence for fuing out the commiffion, fo as to receive more than their ratable dividends of the bankrupt's eftate, they forfeit not only what they fhall have fo received, but their whole debt. Thefe provifions are made as well to fecure perfons in good credit from being damnified by malicious petitions, as to prevent knavifh combinations between the creditors and bankrupt, in order to obtain the benefit of a commiffion. When the commiffion is awarded and iffued, the commiffioners are to meet, at their own expence, and to take an oath for the due execution of their commiffion, and to be allowed a fum not exceeding 20*s.* *per diem* each, at every fitting (17). And no commiffion of bankrupt fhall abate, or be void, upon any demife of the crown [p].

WHEN the commiffioners have received their commiffion, they are firft to receive proof of the perfon's being a trader,

[p] Stat. 5 Geo. II. c. 30.

ter the date thereof; and the firft application by any folicitor on the day after the time limited for a fuperfedeas and a new commiffion fhall be preferred to that of the folicitor who fued out the fuperfedable commiffion. 4 *Bro.* 432.

(17) The three commiffioners who attend the execution of a commiffion are allowed 20*s.* each for every meeting in that commiffion, and by a late order of the chancellor, they cannot adjourn the meeting to another hour on the fame day, fo as to entitle themfelves to a frefh fee. They are allowed alfo 20*s.* each for every affignment and bargain and fale they execute, and the fame for figning a certificate for a fuperfedeas and the certificate of the bankrupt's conformity.

The ftatute only allows 20*s.* for each meeting, but as the commiffioners ufed formerly to meet merely to examine a deed, or the proceedings upon which they granted a certificate, they are now allowed to take diftinct fees for them, although they fign them at a meeting held for the proof of debts, choice of affignees, or any other purpofe. Thefe, with half a guinea, if a commiffioner acknowleges the bargain and fale in the court in which it is inrolled, are all the fees, which the commiffioners either in London or the country are juftified in taking.

and

and having committed ſome act of bankruptcy (18); and then to declare him a bankrupt, if proved ſo; and to give notice thereof in the gazette, and at the ſame time to appoint three meetings. At one of theſe meetings an election muſt be made of aſſignees, or perſons to whom the bankrupt's eſtate ſhall be aſſigned, and in whom it ſhall be veſted for the benefit of the creditors; and aſſignees are to be choſen by the major part, in value, of the creditors who ſhall then have proved their debts; but may be originally appointed by the commiſſioners, and afterwards approved or rejected by the creditors: but no creditor ſhall be admitted to vote in the choice of aſſignees, whoſe debt on the balance of accounts does not amount to 10*l*. And at the third meeting, at fartheſt, which muſt be on the forty-ſecond day after the advertiſement in the gazette, (unleſs the time be enlarged by the lord chancellor (19) the bankrupt, upon notice alſo perſonally ſerved upon [481]

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(18) The firſt inquiry is the amount and nature of the petitioning creditor's debt. And the commiſſioners ought not to admit the proof of this debt upon a depoſition tranſmitted to them, unleſs the petitioning creditor lives at a diſtance, or a ſatisfactory reaſon for his non-attendance is aſſigned and ſworn to by an affidavit. The time ought to be ſpecified in the depoſition of the witneſs who proves the act of bankruptcy; for, upon the death of the witneſs after the proceedings are recorded, the depoſition will be evidence in any court of juſtice. *Doug.* 244. The declarations of the party before he is adjudged a bankrupt are evidence, but they are not alone ſufficient to prove an act of bankruptcy; yet if his abſconding or keeping houſe is proved by other evidence, his declarations will be admitted to ſhew his reaſons for it, and thus to complete the evidence of the act of bankruptcy. The act of bankruptcy may be committed after the party has diſcontinued his trading. *Cooke*, 91—2. Neither the trading nor act of bankruptcy can be proved by a creditor.

(19) The chancellor may order the time to be enlarged fifty days, to be computed from the day fixed for the third meeting; but the order muſt be made ſix days before that day. The order is generally made upon a petition in the name of the bankrupt, and upon condition that he ſurrenders himſelf on the day appointed, between the hours of ten and one in the morning. This order is never denied, where it is thought neceſſary to be at the expence of making the application.

him,

him, or left at his uſual place of abode, muſt ſurrender himſelf perſonally to the commiſſioners; which ſurrender (if voluntary) protects him from all arreſts till his final examination is paſt: and he muſt thenceforth in all reſpects conform to the directions of the ſtatutes of bankruptcy; or, in default of either ſurrender or conformity, ſhall be guilty of felony without benefit of clergy, and ſhall ſuffer death, and his goods and eſtate ſhall be diſtributed among his creditors [q].

IN caſe the bankrupt abſconds, or is likely to run away, between the time of the commiſſion iſſued, and the laſt day of ſurrender, he may by warrant from any judge or juſtice of the peace be apprehended and committed to the county gaol, in order to be forthcoming to the commiſſioners; who are alſo empowered immediately to grant a warrant for ſeiſing his goods and papers [r].

WHEN the bankrupt appears, the commiſſioners are to examine him touching all matters relating to his trade and effects. They may alſo ſummon before them, and examine, the bankrupt's wife [s] and any other perſon whatſoever, as to all matters relating to the bankrupt's affairs. And in caſe any of them ſhall refuſe to anſwer, or ſhall not anſwer fully, to any lawful queſtion, or ſhall refuſe to ſubſcribe ſuch their examination, the commiſſioners may commit them to priſon without bail, till they ſubmit themſelves and make and ſign a full anſwer; the commiſſioners ſpecifying in their warrant of commitment the queſtion ſo refuſed to be anſwered. And any gaoler, permitting ſuch perſon to eſcape, or go out of priſon, ſhall forfeit 500*l.* to the creditors [t].

[482] THE bankrupt, upon this examination, is bound upon pain of death to make a full diſcovery of all his eſtate and effects, as well in expectancy as poſſeſſion, and how he has diſpoſed of the ſame; together with all books and writings relating thereto: and is to deliver up all in his own power to the commiſſioners; (except the neceſſary apparel of himſelf, his wife, and his children) or, in caſe he conceals or embezzles any effects to the amount of 20*l.* or withholds any books or writ-

q Stat. 5 Geo. II. c. 30.

r *Ibid.*

s Stat. 21 Jac. I. c. 19.

t Stat. 5 Geo. II. c. 30.

ings

ings with intent to defraud his creditors, he ſhall be guilty of felony without benefit of clergy; and his goods and eſtates ſhall be divided among his creditors [u]. And unleſs it ſhall appear, that his inability to pay his debts aroſe from ſome caſual loſs, he may, upon conviction by indictment of ſuch groſs miſconduct and negligence, be ſet upon the pillory for two hours, and have one of his ears nailed to the ſame and cut off [v] (20).

AFTER the time allowed to the bankrupt for ſuch diſcovery is expired, any other perſon voluntarily diſcovering any part of his eſtate, before unknown to the aſſignees, ſhall be entitled to *five per cent.* out of the effects ſo diſcovered, and ſuch farther reward as the aſſignees and commiſſioners ſhall think proper. And any truſtee wilfully concealing the eſtate of any bankrupt, after the expiration of the two and forty days, ſhall forfeit 100*l.* and double the value of the eſtate concealed, to the creditors [w].

HITHERTO every thing is in favour of the creditors; and the law ſeems to be pretty rigid and ſevere againſt the bankrupt; but, in caſe he proves honeſt, it makes him full amends for all this rigor and ſeverity. For if the bankrupt hath made an ingenuous diſcovery, (of the truth and ſufficiency of which there remains no reaſon to doubt) and hath conformed in all points to the directions of the law; and if, in conſequence thereof, the creditors, or four parts in five of them in number and value, (but none of them creditors for leſs than 20*l.*) will ſign a certificate to that purport; the commiſſioners are then to authenticate ſuch certificate under their hands and ſeals (21),

u Stat. 5 Geo. II. c. 30. By the laws of Naples all fraudulent bankrupts, particularly ſuch as do not ſurrender themſelves within four days, are puniſhed with death: alſo all who conceal the effects of a bankrupt, or ſet up a pretended debt to defraud his creditors. (Mod. Un. Hiſt. xxviii. 320.)

v Stat. 21 Jac. I. c. 19.

w Stat. 5 Geo. II. c. 30.

(20) There are inſtances of convictions and executions of bankrupts for not ſurrendering, and for concealment of their effects; *Grene*, 208; but I never read of any proſecution for this offence.

(21) The commiſſioners may at their diſcretion, as well as the creditors, refuſe to ſign the certificate; but after it is ſigned by the commiſſioners, notice is to be given in the Gazette that it will be allowed by the chancellor, unleſs cauſe is ſhewn to the contrary within twenty-one days. And if within that time any petition is preſented

and to tranſmit it to the lord chancellor: and he, or two of the judges whom he ſhall appoint, on oath made by the bankrupt that ſuch certificate was obtained without frand, may allow the ſame; or diſallow it, upon cauſe ſhewn by any of the creditors of the bankrupt[x].

IF no cauſe be ſhewn to the contrary, the certificate is allowed of courſe; and then the bankrupt is entitled to a decent and reaſonable allowance out of his effects, for his future ſupport and maintenance, and to put him in a way of honeſt induſtry. This allowance is alſo in proportion to his former good behaviour, in the early diſcovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten ſhillings in the pound, he is left to the diſcretion of the commiſſioners and aſſignees, to have a competent ſum allowed him, not exceeding *three per cent;* but if they pay ten ſhillings in the pound, he is to be allowed *five per cent;* if twelve ſhillings and ſix-pence, then *ſeven and a half per cent;* and if fifteen ſhillings in the pound, then the bankrupt ſhall be allowed *ten per cent:* provided, that ſuch allowance do not in the firſt caſe exceed 200*l.* in the ſecond 250*l.* and in the third 300*l.*[y].

BESIDES this allowance, he has alſo an indemnity granted him, of being free and diſcharged for ever from all debts

x Stat. 5 Geo. II. c. 30.

y *Ibid.* By the Roman law of ceſſion, if the debtor acquired any conſiderable property ſubſequent to the giving up of his all, it was liable to the demands of his creditors (*Ff.* 42. 3. 4.) But this did not extend to ſuch allowance as was left to him on the ſcore of compaſſion for the maintenance of himſelf and family. *Si quid miſericordiae cauſa ei fuerit relictum, puta menſtruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterato venundari: nec enim fraudandus eſt alimentis cottidianis.* (*Ibid. l.* 6.)

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preſented by a creditor to the chancellor for that purpoſe, the allowance is ſtayed till the bankrupt can anſwer the allegations, and the chancellor has an opportunity of conſidering the validity of the objection. If the number of creditors is leſs than five, all muſt ſign as four-fifths of four are three and one-fifth of another; and wherever there is a fraction, of neceſſity a whole creditor muſt ſign. And this is true of every other not exactly diviſible by five.

owing by him at the time he became a bankrupt; even though judgment ſhall have been obtained againſt him, and he lies in priſon upon execution for ſuch debts; and, for that among other purpoſes, all proceedings on commiſſions of bankrupt are, on petition, to be entered of record, as a perpetual bar againſt actions to be commenced on this account: though, in general, the production of the certificate properly allowed ſhall be ſufficient evidence of all previous proceedings[z] (22). [484]
Thus the bankrupt becomes a clear man again; and, by the aſſiſtance of his allowance and his own induſtry, may become a uſeful member of the commonwealth: which is the rather to be expected, as he cannot be entitled to theſe benefits, unleſs his failures have been owing to misfortunes, rather than to miſconduct and extravagance (23).

z Stat. 5 Geo. II. c. 30.

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(22) That is, in an action brought againſt the bankrupt for a debt due before the bankruptcy, unleſs the plaintiff can prove a concealment by the bankrupt to the amount of 10*l.*, or that the certificate was obtained by fraud. 5 *Geo. II. c.* 30. *ſ.* 8.

(23) The bankrupt is diſcharged by his certificate from all debts which could have been proved under the commiſſion, but he is ſtill liable to make a reparation in damages for all torts or injuries done by him before the bankruptcy; for theſe could not be proved, as the extent of the damages muſt be aſcertained by a jury. Hence alſo he is not diſcharged from any breach of covenant; and even where he covenants for payment of rent, although the leaſe and premiſes are diſpoſed of by the aſſignees for the benefit of the creditors, the bankrupt ſtill remains liable to be ſued by the landlord upon his covenant. 4 *T. R.* 94. This is a hard caſe, for the landlord has his remedy alſo againſt the tenant in poſſeſſion. The bankrupt is not diſcharged from any contingent debts, where the contingency happens after the bankruptcy: theſe are debts which originate from ſomething done previous to the bankruptcy, but which become abſolutely debts at ſome period ſubſequent to it. As when one man is ſurety for another, the principal is not indebted to the ſurety till his ſurety is obliged to pay the debt for him. Therefore if this does not happen till after the bankruptcy, the ſurety cannot prove his debt under the commiſſion; and of conſequence, the bankrupt is not diſcharged by the certificate. But it is determined

FOR no allowance or indemnity ſhall be given to a bankrupt, unleſs his certificate be ſigned and allowed, as beforementioned; and alſo, if any creditor produces a fictitious debt, and the bankrupt does not make diſcovery of it, but ſuffers the fair creditors to be impoſed upon, he loſes all title to theſe advantages[a]. Neither can he claim them, if he has

[a] Stat. 24 Geo. II. c. 57.

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that, if the principal gives the ſurety an abſolute unconditional bond as an indemnity, he may prove it under the commiſſion, though he has never been called upon to pay the debt of the principal. 2 *T. R.* 640. Yet in ſuch a caſe it muſt be preſumed that the ſurety would be reſtrained from receiving under the dividend more than he had actually been compelled to pay, or from receiving any thing at all till he was actually damnified. In analogy to the contingent debts of ſureties, I conceive two caſes have lately been determined, one in the common pleas upon a bill of exchange, *H. Bl. Rep.* 640; the other in the king's bench upon a promiſſory note, 4 *T. R.* 714. In each caſe the payee was obliged to take back the bill or note, and to pay the value of it after the bankruptcy of the drawer; againſt whom he afterwards brought an action, who pleaded his bankruptcy and certificate in bar; but the courts held in the reſpective caſes, that the bankrupt was not diſcharged by the certificate. But in both theſe caſes it may be collected from the reports, that they were merely accommodation bills, that the payees had given no value before the bankruptcy, that they had lent their names merely as ſureties, and of conſequence, that the bankrupt was not indebted to them till they had been obliged to pay the amount of theſe bills. This circumſtance is ſo ſlightly ſtated in each report, particularly in the latter, as to induce many readers to ſuppoſe that no indorſer, who is obliged to take back a bill or note after the bankruptcy of the drawer or acceptor, can prove it under his commiſſion. But I apprehend the courts never intended to ſay that a holder of a bill, who has given full value for it before the bankruptcy of the drawer or acceptor, and is obliged to take it back after his bankruptcy, cannot prove it under the commiſſion; a debt is due to him before the bankruptcy, which cannot be affected or diſturbed by the ſubſequent aſſignment and re-aſſignment of the bill. It has been determined, that the aſſignment relates to the original debt, and the aſſignee ſtands in his place. *Cooke*, 25. Hence an indorſee without notice, after the iſſuing of the commiſſion, ought to be admitted to prove, and have relief under the commiſſion.

given

given with any of his children above 100*l.* for a marriage portion, unlefs he had at that time fufficient left to pay all his debts; or if he has loft at any one time 5*l.* or in the whole 100*l.* within a twelvemonth before he became bankrupt, by any manner of gaming or wagering whatfoever; or within the fame time has loft to the value of 100*l.* by ftock-jobbing. Alfo to prevent the too common practice of frequent and fraudulent or carelefs breaking, a mark is fet upon fuch as have been once cleared by a commiffion of bankrupt, or have compounded with their creditors, or have been delivered by an act of infolvency: which is an occafional act, frequently paffed by the legiflature: whereby all perfons whatfoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile ftate of life, are not included within the laws of bankruptcy, are difcharged from all fuits and imprifonment, upon delivering up all their eftate and effects to their creditors upon oath, at the feffions or affizes; in which cafe their perjury or fraud is ufually, as in cafe of bankrupts, punifhed with death. Perfons who have been once cleared by any of thefe methods, and afterwards become bankrupts again, unlefs they pay full fifteen fhillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future eftate they fhall acquire remains liable to their creditors, excepting their neceffary apparel, houfehold goods, and the tools and implements [485] of their trades [b] (24).

THUS much for the proceedings on a commiffion of bankrupt, fo far as they affect the bankrupt himfelf perfonally. Let us next confider,

b Stat. 5 Geo. II. c. 30.

(24) If they do not pay fifteen fhillings in the pound under the fecond commiffion, the fecond certificate is no bar to an action or execution againft their future effects. 5 *T. R.* 287.

4. How ſuch proceedings affect or transfer the *eſtate* and *property* of the bankrupt. The method whereby a *real* eſtate, ni lands, tenements, and hereditaments, may be transferred by bankruptcy, was ſhewn under it's proper head in a former chapter [c]. At preſent therefore we are only to conſider the transfer of things *perſonal* by this operation of law.

By virtue of the ſtatutes before-mentioned [d] all the perſonal eſtate and effects of the bankrupt are conſidered as veſted, by the act of bankruptcy, in the future aſſignees of his commiſſioners, whether they be goods in actual *poſſeſſion*, or debts, contracts, and other choſes in *action*; and the commiſſioners by their warrant may cauſe any houſe or tenement of the bankrupt to be broken open, in order to enter upon and ſeiſe the ſame. And when the aſſignees are choſen or approved by the creditors, the commiſſioners are to aſſign every thing over to them; and the property of every part of the eſtate is thereby as fully veſted in them, as it was in the bankrupt himſelf, and they have the ſame remedies to recover it [e] (25).

The property veſted in the aſſignees is the whole that the bankrupt had in himſelf, at the time he committed the firſt act of bankruptcy, or that has been veſted in him ſince, before his debts are ſatisfied or agreed for. Therefore it is uſually ſaid, that once a bankrupt, and always a bankrupt: by which is meant, that a plain direct act of bankruptcy once

[c] pag. 285.
[d] Stat. 1 Jac. I. c. 15. 21 Jac. I. c. 19.
[e] 12 Mod. 324.

(25) And it has been decided after much ſerious argument, that the aſſignment of the commiſſioners conveys the bankrupt's perſonal property and intereſts, which are out of the kingdom at the time of bankruptcy and aſſignment. 4 *T. R.* 182.

And by the aſſignment the property is ſo completely veſted in the aſſignees, that the bankrupt is not entitled to receive from his eſtate even the neceſſary ſubſiſtence of himſelf and family, but by the favour and indulgence of the aſſignees and creditors. 1 *T. R.* 157.

committed

committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may be[f] (26); but that, if a commission is afterwards awarded, the commission and the property of the assignees shall have a relation, or reference, back to the first and original act of bankruptcy[g]. [486]
Insomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not served and executed on the bankrupt's effects, till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts[h]; for if, after the act of bankruptcy committed and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby[i] (27). In France this doc-

f Salk. 110.
g 4 Burr. 32.
h 1 Atk. 262.
i Viner. Abr. t. creditor and bankr. 104.

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(26) The court of king's bench have gone so far in holding that a clear unequivocal act of bankruptcy cannot be wiped away by any subsequent conduct, as to decide, that if a merchant is denied in a morning, when a holder of a bill comes for payment, it is an irrevocable act of bankruptcy, even though he should pay the bill in the course of that day, before it could be protested, or he could be sued upon it. 2 *T. R.* 59. This is a severe case; and it has rather the appearance of a *petitio principii* to pronounce it an unequivocal act of bankruptcy. A denial is not of itself an act of bankruptcy, but only evidence of one; *viz.* a beginning to keep house with *intent* to defraud and hinder creditors; and where a debtor prevents his creditor from being hindered for a moment after he has a right to demand payment, ought we not in candour and justice to presume that he never had that intent? Indeed, in such a case it is not improbable that the denial was merely for the purpose of procuring the means of discharging the debt.

(27) The king not being expresly named in the bankrupt statutes, is held not to be bound by them, 2 *Str.* 982; and therefore

trine of relation is carried to a very great length; for there every act of a merchant, for ten days *precedent* to the act of bankruptcy, is presumed to be fraudulent, and is therefore void [k]. But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to it's utmost length, it is provided by statute 19 Geo. II. c. 32. that no money paid by a bankrupt to a *bona fide* or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded (28). Nor, by statute 1 Jac. I. c. 15. shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again (29). The intention of this re-

[k] Sp. L. b. 29. c. 16.

an extent will bind the property of the bankrupt, if it is issued before the actual assignment of the commissioners; which assignment, by changing the property, defeats the subsequent process of the crown. When therefore it is apprehended the bankrupt is indebted to the crown, the commissioners execute immediately a provisional assignment, by which means the crown will be entitled to no more than an equal share with the other creditors. If the extent and the assignment bear date on the same day, the extent shall be preferred. *Park. Rep.* 126. *Green,* 126.

(28) This statute extends it's protection to the creditor of the bankrupt in two instances only, *viz.* when he has received payment, without notice of the bankruptcy, either for goods sold, or for a bill of exchange, which in the usual course of trade the bankrupt is liable to pay. And it has been determined, that a creditor was compellable to refund, who had given further time to the bankrupt when a bill became due, at his request, and upon a promise to pay interest, and who afterwards received the amount of it with interest, without any notice that the debtor had committed an act of bankruptcy; for the court held this to be the payment of a loan, and not of a bill. 2 *T. R.* 648. So also a creditor has been obliged to refund money paid by a trader, after a secret act of bankruptcy, for the carriage of goods. 5 *T. R.* 197.

(29) If a debtor pays the debt to a trader, with the knowledge of an act of bankruptcy committed by him, if afterwards a commission issues, he may be compelled to pay it over again to the assignees;

lative power being only to reach fraudulent transactions, and not to distress the fair trader.

THE assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority; but cannot commence a suit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value (30), at a meeting to be held in pursuance of notice in the gazette[1].

WHEN they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after four and within twelve months after the commission issued, give one and twenty days notice to the creditors of a meeting for a dividend or distribution (31); at which time they must produce their accounts, and verify them upon oath, if required (32). And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages indeed, [487]

[1] Stat. 5 Geo. II. c. 30.

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signees; as where a banker pays a trader's drafts, after knowledge of an act of bankruptcy. 2 *T. R.* 113.

But he will not be liable to repay it, if he pays it after a judgment obtained without fraud. 2 *T. R.* 482.

(30) In all meetings of creditors under the statute, the determination is to be made by the major part in value; number seems never to be regarded but in signing the certificate. The assignees may bring actions at law without consulting the creditors.

(31) The notice is to be given by an advertisement in the London Gazette.

(32) At a meeting for the first dividend, the assignees are seldom required by the commissioners or creditors to verify their accounts upon oath, but the dividend is ordered upon their *admission* that they have recovered property to a certain amount; but upon making a final dividend, the oath of the assignees cannot be dispensed with.

for which the creditor has a real ſecurity in his own hands, are entirely ſafe; for the commiſſion of bankrupt reaches only the equity of redemption[m]. So are alſo perſonal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution (33). And, upon the equity of the ſtatute 8 Ann,

m Finch. Rep. 466.

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(33) When a creditor proves his debt, he ſtates in his depoſition either that he has received no ſecurity, or what the ſecurity is.

If he has a ſecurity and wiſhes to prove and receive a dividend, he muſt deliver up the ſecurity for the benefit of the creditors, unleſs it is a joint ſecurity from the bankrupt and another perſon, and then he may receive a dividend upon the whole due at the time of the depoſition, and may have recourſe to the co-ſurety beſides; provided he does not receive more than 20*s.* in the pound for the whole debt. But every ſecurity, which the creditor has in his poſſeſſion, muſt be exhibited to the commiſſioners when he proves his debt. If a creditor, having received the whole of his debt, from a ſurety or from another party upon a bill of exchange, ſhould afterwards conceal this circumſtance and take a dividend under a bankrupt's eſtate, it would be a fraud which I am ſure would be puniſhed, as it ought to be, in the moſt exemplary manner. I particularly mention this from having had occaſion to obſerve the great number of debts proved under commiſſions of bankrupt, where there were ſolvent parties, who from the nature of the tranſaction ought to have been firſt called upon to diſcharge the debt; and this fraud may be more eaſily practiſed, from the commiſſioners and aſſignees having no opportunity of examining theſe creditors afterwards upon oath, unleſs a ſpecial meeting is held for the purpoſe. It can only therefore be recommended to the aſſignees, to make diligent inquiry into the conduct of theſe creditors with regard to ſuch debts, and when they diſcover ſuch a fraud to be attempted or practiſed, to bring the offender to the ſhame and puniſhment he ſo juſtly deſerves.

If a creditor proves an aggregate debt, and ſtates more than one ſecurity; for inſtance, two or more bills or notes; if he receives the value of any one of them in full, ſo much at the time of the dividend muſt be deducted from the amount of the debt proved.

Cooke,

c. 14. (which directs, that, upon all executions of goods being on any premises demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord) it hath also been held, that under a commission of bankrupt, which is in the nature of a statute-execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors (34), even though he hath neglected to distrain, while the goods remained on the premises; which he is otherwise entitled to do for his entire rent, be the *quantum* what it may [n]. But, otherwise, judgments and recognizances, (both which [488] are debts of record, and therefore at other times have a priority) and also bonds and obligations by deed or special instrument, (which are called debts by specialty, and are usually the next in order) these are all put on a level with debts by mere simple contract, and all paid *pari passu* [o]. Nay, so far is this matter carried, that, by the express provision of the statutes [p], debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest [q], allowing a discount or drawback in pro-

[n] 1 Atk. 103, 104.
[o] Stat. 21 Jac. c. 19.
[p] Stat. 7 Geo. I. c. 31.
[q] Lord Raym. 1549. Stra. 1211.

Cooke, 195. Where a creditor has a mortgage or pledge, which he thinks insufficient to satisfy the whole of his debt, he may petition the chancellor to have it sold, and the produce of it to be applied in diminution of the debt, and to prove the deficiency under the commission. *Cooke*, 149.

(34) Lord Bathurst chancellor declared expressly, that this proposition in the Commentaries was erroneous, and decreed that a landlord, if he has not availed himself of his right to distrain, has no privilege under the bankrupt statutes, but must come in *pari passu* with other creditors for every part of the rent due to him. *Cooke*, 222.

Yet a landlord may distrain for all the rent due, even after a provisional or absolute assignment, while the goods continue upon the premises. 1 *Atk*. 103.

portion.

portion(35). And insurances, and obligations upon bottomry or *respondentia*, *bona fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy [r] (36).

WITHIN eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first [s] (37). And if any surplus remains, after selling his estates and paying every creditor his full debt, it shall be restored to the bankrupt [t]. This is a case which sometimes happen to men in trade, who involuntarily, or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that, upon satis-

r Stat. 19 Geo. II. c. 32.
s Stat. 5 Geo. II. c. 30.
t Stat. 13 Eliz. c. 7.

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(35) The whole of such a debt must be proved, and if it is not payable when a dividend is declared, the discount for the time which is then to run, must be deducted from the whole sum, and the creditor shall be allowed a dividend upon the remainder.

(36) Where an obligor in a bottomry or respondentia bond, or an underwriter, becomes a bankrupt, the obligee and the assured shall be permitted to claim; and after the contingency happens upon which the bond is due, or upon the loss of the ship, or other event against which the insurance is made, they shall be admitted to prove, as if these events had happened before the bankruptcy. 19 *Geo. II. c.* 32.

(37) If a creditor has not proved before a second dividend, it is now the practice of the commissioners, to receive the proof of his debt, without an order from the chancellor, and to admit him to be paid equally with the rest of the creditors, if there is sufficient property left in the hands of the assignees, and then to direct an equal distribution of the residue. *Cooke*, 589.

faction

faction made to all the creditors, the commiſſion may be *ſuperſeded*[u]. This caſe may alſo happen, when a knave is deſirous of defrauding his creditors, and is compelled by a commiſſion to do them that juſtice, which otherwiſe he wanted to evade. And therefore, though the uſual rule is, that all intereſt on debts carrying intereſt ſhall ceaſe from the time of iſſuing the commiſſion, yet, in caſe of a ſurplus left after payment of every debt, ſuch intereſt ſhall again revive, and be chargeable on the bankrupt[w], or his repreſentatives (38).

[u] 2 Ch. Caſ. 144. [w] 1 Atk. 244.

(38) Bills and notes, in which intereſt is not named, carry intereſt only between the proteſt and the date of the commiſſion.

CHAPTER THE THIRTY-SECOND.

OF TITLE BY TESTAMENT, AND ADMINISTRATION.

THERE yet remain to be examined, in the present chapter, two other methods of acquiring perſonal eſtates, *viz.* by *teſtament* and *adminiſtration.* And theſe I propoſe to conſider in one and the ſame view; they being in their nature ſo connected and blended together, as makes it impoſſible to treat of them diſtinctly, without manifeſt tautology and repetition.

XI, XII. IN the purſuit then of this joint ſubject, I ſhall, firſt, inquire into the original and antiquity of teſtaments and adminiſtrations; ſhall, ſecondly, ſhew who is capable of making a laſt will and teſtament; ſhall, thirdly, conſider the nature of a teſtament and it's incidents; ſhall, fourthly, ſhew what an executor and adminiſtrator are, and how they are to be appointed; and, laſtly, ſhall ſelect ſome few of the general heads of the office and duty of executors and adminiſtrators.

FIRST, as to the *original* of teſtaments and adminiſtrations. We have more than once obſerved, that when property came to be veſted in individuals by the right of occupancy, it became neceſſary for the peace of ſociety, that this occupancy ſhould be continued, not only in the preſent poſſeſſor, but in thoſe perſons to whom he ſhould think proper to transfer it; which introduced the doctrine and practice of alienations, gifts,

gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons [a]. The former method of acquiring personal property, according to the express directions of the deceased, we call a *testament:* the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law [b], we call in England an *administration;* being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

TESTAMENTS are of very high antiquity. We find them in use among the antient Hebrews; though I hardly think the example usually given [c], of Abraham's complaining [d] that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to shew that he had made him so by *will*. And indeed a learned writer [e] has adduced this very passage to prove, that in the patriarchal age, on failure of children, or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law [f]. But, (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world [g]) I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings [h], wherein Jacob bequeaths to his son Joseph a portion of his in-

a Puff. L. of N. b. 4. c. 10.
b *Ibid.* b. 4. c. 11.
c Barbeyr. Puff. 4. 10. 4. Godolph. Orph. Leg. 1. 1.
d Gen. c. 15.
e Taylor's elem. civ. law. 517.
f See pag. 12.
g Selden. *de succ. Ebr. c.* 24.
h Gen. c. 48.

 heritance

heritance double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the poſterity of Joſeph were divided into two diſtinct tribes, thoſe of Ephraim and Manaſſeh, and had two ſeveral inheritances aſſigned them; whereas the deſcendants of each of the other patriarchs formed only one ſingle tribe, and had only one lot of inheritance. Solon was the firſt legiſlator that introduced wills into Athens [i]; but in many other parts of Greece they were totally diſcountenanced [k]. In Rome they were unknown, till the laws of the twelve tables were compiled, which firſt gave the right of bequeathing [l]: and, among the northern nations, particularly among the Germans [m], teſtaments were not received into uſe. And this variety may ſerve to evince, that the right of making wills, and diſpoſing of property after death, is merely a creature of the civil ſtate [n]; which has permitted it in ſome countries, and denied it in others: and, even where it is permitted by law, it is ſubjected to different formalities and reſtrictions in almoſt every nation under heaven [o].

WITH us in England this power of bequeathing is co-eval with the firſt rudiments of the law: for we have no traces or memorials of any time when it did not exiſt. Mention is made of inteſtacy, in the old law before the conqueſt, as being merely accidental; and the diſtribution of the inteſtate's eſtate, after payment of the lord's heriot, is then directed to go according to the eſtabliſhed law. "*Sive quis incuria, ſive* "*morte repentina, fuerit inteſtatus mortuus, dominus tamen nul-* "*lam rerum ſuarum partem (praeter eam quae jure debetur he-* "*reoti nomine) ſibi aſſumito. Verum poſſeſſiones uxori, liberis,* "*et cognatione proximis, pro ſuo cuique jure, diſtribuantur* [p]." But we are not to imagine, that this power of bequeathing extended originally to *all* a man's perſonal eſtate. On the contrary, Glanvil will inform us [q], that by the common law,

[i] Plutarch. *in vita Solon.*
[k] Pott. Antiq. l. 4. c. 15.
[l] *Inſt.* 2. 22. 1.
[m] Tacit. *de mor. Germ.* 21.
[n] See pag. 13.
[o] Sp. L. b. 27. c. 1. Vinnius *in Inſt. l.* 2. *tit.* 10.
[p] *LL. Canut.* c. 68.
[q] *l.* 2. c. 5.

as

as it ſtood in the reign of Henry the ſecond, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal deſcendants, another to his wife, and the third was at his own diſpoſal: or, if he died without a wife, he might then diſpoſe of one moiety, and the other went to his children; and ſo *e converſo*, if he had no children the wife was entitled to one moiety, and he might bequeath the other: but, if he died without either wife or iſſue, the whole was at his own diſpoſal [r]. The ſhares of the wife and children were called their *reaſonable* parts; and the writ *de rationabili parte bonorum* was given to recover them [s].

THIS continued to be the law of the land at the time of *magna carta*, which provides, that the king's debts ſhall firſt of all be levied, and then the reſidue of the goods ſhall go to the executor to perform the will of the deceaſed: and, if nothing be owing to the crown, "*omnia catalla cedant defuncto;* "*ſalvis uxori ipſius et pueris ſuis rationabilibus partibus ſuis* [t]." In the reign of king Edward the third this right of the wife and children was ſtill held to be the univerſal or common law [u]; though frequently pleaded as the local cuſtom of Berks, Devon, and other counties [w]: and ſir Henry Finch lays it down expreſsly [x], in the reign of Charles the firſt, to be the general law of the land. But this law is at preſent altered by imperceptible degrees, and the deceaſed may now by will bequeath the whole of his goods and chattels; though we cannot trace out when firſt this alteration began. Indeed ſir Edward Coke [y] is of opinion, that this never was

[r] Bracton. *l.* 2. *c.* 26. Flet. *l.* 2. *c.* 57.

[s] F. N. B. 122.

[t] 9 Hen. III. c. 18.

[u] A widow brought an action of detinue againſt her huſband's executors, *quod cum per conſuetudinem totius regni Angliae hactenus uſitatam et approbatam, uxores debent et ſolent a tempore, &c. habere ſuam rationabilem partem bonorum maritorum ſuorum: ita videlicet, quod ſi nullos habuerint liberos, tunc medietatem; et, ſi habuerint, tunc tertiam partem, &c.* and that her huſband died worth 200,000 marks, without iſſue had between them; and thereupon ſhe claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the huſband's dying without iſſue was denied; but the rule of law, as ſtated in the writ, ſeems to have been univerſally allowed. (*M.* 30 *Edw. III.* 25.) And a ſimilar caſe occurs in *H.* 17 *Edw. III.* 9.

[w] *Reg. Brev.* 142. Co. Litt. 176.

[x] Law. 175.

[y] 2 Inſt. 33.

the general law, but only obtained in particular places by ſpecial cuſtom: and to eſtabliſh that doctrine, he relies on a paſſage in Bracton, which, in truth, when compared with the context, makes directly againſt his opinion. For Bracton[z] lays down the doctrine of the reaſonable part to be the common law; but mentions that as a particular exception, which ſir Edward Coke has haſtily cited for the general rule. And Glanvil, *magna carta*, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which alſo continues to this day to be the general law of our ſiſter kingdom of Scotland[a]. To which we may add, that, whatever may have been the cuſtom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the antient method continued in uſe in the province of York, the principality of Wales, and in the city of London, till very modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the ſame ſtandard, three ſtatutes have been provided; the one 4 & 5 W. & M. c. 2. explained by 2 & 3 Ann. c. 5. for the province of York; another 7 & 8 W. III. c. 38. for Wales; and a third, 11 Geo. I. c. 18. for London: whereby it is enacted, that perſons within thoſe diſtricts, and liable to thoſe cuſtoms, may (if they think proper) diſpoſe of *all* their perſonal eſtates by will; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly aboliſhed throughout all the kingdom of England, and a man may deviſe the whole of his chattels as freely as he formerly could his third part or moiety. In diſpoſing of which, he was bound by the cuſtom of many places (as was ſtated in a former chapter[b]) to remember his lord and the church, by leaving them his two beſt chattels, which was the original of heriots and mortuaries; and afterwards he was left at his own liberty, to bequeath the remainder as he pleaſed.

z *l.* 2. c. 26. § 2.

a Dalrymp. of feud. property. 145.

b pag. 426.

IN

IN caſe a perſon made no diſpoſition of ſuch of his goods as were teſtable, whether that were only part or the whole of them, he was, and is, ſaid to die inteſtate; and in ſuch caſes it is ſaid, that by the old law the king was entitled to ſeiſe upon his goods, as the *parens patriae*, and general truſtee of the kingdom [c]. This prerogative the king continued to exerciſe for ſome time by his own miniſters of juſtice; and probably in the county court, where matters of all kinds were determined: and it was granted as a franchiſe to many lords of manors, and others, who have to this day a preſcriptive right to grant adminiſtration to their inteſtate tenants and ſuitors, in their own courts baron and other courts, or to have their wills there proved, in caſe they made any diſpoſition [d]. Afterwards the crown, in favour of the church, inveſted the prelates with this branch of the prerogative; which was done, ſaith Perkins [e], becauſe it was intended by the law, that ſpiritual men are of better conſcience than laymen, and that they had more knowlege what things would conduce to the benefit of the ſoul of the deceaſed. The goods therefore of inteſtates were given to the ordinary by the crown; and he might ſeiſe them, and keep them without waſting, and alſo might give, aliene, or ſell them at his will, and diſpoſe of the money in *pios uſus*: and, if he did otherwiſe, he broke the confidence which the law repoſed in him [f]. So that properly the whole intereſt and power which were granted to the ordinary, were only thoſe of being the king's almoner within his dioceſe; in truſt to diſtribute the inteſtate's goods in charity to the poor, or in ſuch ſuperſtitious uſes as the miſtaken zeal of the times had denominated pious [g]. And, as he had thus the diſpoſition of inteſtates' effects, the probate of wills of courſe followed: for it was thought juſt and natural, that the will of the deceaſed ſhould be proved to the ſatisfaction of the prelate, whoſe right of diſtributing his chattels for the good of his ſoul was effectually ſuperſeded thereby.

[c] 9 Rep. 38.
[d] *Ibid.* 37.
[e] § 486.
[f] Finch. Law. 173, 174.
[g] Plowd. 277.

THE goods of the inteſtate being thus veſted in the ordinary upon the moſt ſolemn and conſcientious truſt, the reverend prelates were therefore not accountable to any, but to God and themſelves, for their conduct [h]. But even in Fleta's time it was complained [i], "*quod ordinarii, hujuſmodi bona* "*nomine eccleſiae occupantes, nullam vel ſaltem indebitam faciunt* "*diſtributionem.*" And to what a length of iniquity this abuſe was carried, moſt evidently appears from a gloſs of pope Innocent IV [k], written about the year 1250; wherein he lays it down for eſtabliſhed canon law, that "*in Britannia* "*tertia pars bonorum decedentium ab inteſtato in opus eccleſiae et* "*pauperum diſpenſanda eſt.*" Thus the popiſh clergy took to themſelves [l] (under the name of the church and poor) the whole reſidue of the deceaſed's eſtate, after the *partes rationabiles*, or two thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reaſon it was enacted by the ſtatute of Weſtm. 2. [m] that the ordinary ſhall be bound to pay the debts of the inteſtate ſo far as his goods will extend, in the ſame manner that executors were bound in caſe the deceaſed had left a will: a uſe more truly pious, than any *requiem*, or maſs for his ſoul. This was the firſt check given to that exorbitant power, which the law had entruſted with ordinaries. But, though they were now made liable to the creditors of the inteſtate for their juſt and lawful demands: yet the *reſiduum*, after payment of debts, remained ſtill in their hands, to be applied to whatever purpoſes the conſcience of the ordinary ſhould approve. The flagrant abuſes of which power occaſioned the legiſlature again to interpoſe, in order to prevent the ordinaries from keeping any longer the adminiſtration in their own hands, or thoſe of their immediate de-

[h] Plowd. 277.

[i] *l.* 2. *c.* 57. § 10.

[k] *in Decretal. l.* 5. *t.* 3. *c.* 42.

[l] The proportion given to the prieſt, and to other pious uſes, was different in different countries. In the archdeaconry of Richmond in Yorkſhire, this proportion was ſettled by a papal bulle, *A. D.* 1254. (*Regiſt. honoris de Richm.* 101.) and was obſerved till aboliſhed by the ſtatute 26 Hen. VIII. c. 15.

[m] 13 Edw. I. c. 19.

pendents:

pendents: and therefore the ſtatute 31 Edw. III. c. 11. provides, that, in caſe of inteſtacy, the ordinary ſhall depute the neareſt and moſt lawful friends of the deceaſed to adminiſter his goods; which adminiſtrators are put upon the ſame footing, with regard to ſuits and to accounting, as executors appointed by will. This is the original of adminiſtrators, as they at preſent ſtand; who are only the officers of the ordinary, appointed by him in purſuance of this ſtatute, which ſingles out the *next and moſt lawful friend* of the inteſtate; who is interpreted [n] to be the *next of blood* that is under no legal diſabilities. The ſtatute 21 Hen. VIII. c. 5. enlarges a little more the power of the eccleſiaſtical judge; and permits him to grant adminiſtration *either* to the widow, *or* the next of kin, *or* to both of them, at his own diſcretion; and where two or more perſons are in the ſame degree of kindred, gives the ordinary his election to accept whichever he pleaſes.

UPON this footing ſtands the general law of adminiſtrations at this day. I ſhall, in the farther progreſs of this chapter, mention a few more particulars, with regard to who may, and who may not, be adminiſtrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only ſerving to ſhew the original and gradual progreſs of teſtaments and adminiſtrations; in what manner the latter was firſt of all veſted in the biſhops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular perſons nominated expreſsly by the law.

I PROCEED now, *ſecondly*, to inquire who may, or may not, make a teſtament; or what perſons are abſolutely obliged by law to die inteſtate. And this law [o] is entirely prohibitory; for, regularly, every perſon hath full power and liberty to make a will, that is not under ſome ſpecial prohibition by law or cuſtom: which prohibitions are principally upon three

[n] 9 Rep. 39.

[o] Godolph. Orph. Leg. *p.* 1. *c.* 7.

accounts; for want of ſufficient diſcretion; for want of ſufficient liberty and free will; and on account of their criminal conduct.

1. IN the firſt ſpecies are to be reckoned infants, under the age of fourteen if males, and twelve if females; which is the rule of the civil law [p]. For, though ſome of our common lawyers have held that an infant of any age (even four(1) years old) might make a teſtament [q], and others have denied that under eighteen he is capable [r], yet as the eccleaſtical court is the judge of every teſtator's capacity, this caſe muſt be governed by the rules of the eccleſiaſtical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but, if the teſtator was not of ſufficient diſcretion, whether at the age of fourteen or four and twenty, that will overthrow his teſtament. Madmen, or otherwiſe *non compotes*, ideots or natural fools, perſons grown childiſh by reaſon of old age or diſtemper, ſuch as have their ſenſes beſotted with drunkenneſs—all theſe are incapable, by reaſon of mental diſability, to make any will ſo long as ſuch diſability laſts (2). To this claſs alſo may be referred ſuch perſons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of underſtanding, are incapable of having *animum teſtandi*, and their teſtaments are therefore void.

2. SUCH perſons, as are inteſtable for want of liberty or freedom of will, are by the civil law of various kinds; as

p Godolph. p. 1. c. 8. Wentw. 212. 2 Vern. 104. 469. Gilb. Rep. 74.

q Perkins. § 503.

r Co. Litt. 89.

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(1) This has been thought an error of the preſs, and that four by miſtake was printed for fourteen. See this ſubject learnedly inveſtigated by Mr. Hargrave, who concludes with the learned Judge, that a will of perſonal eſtate may be made by a male at the age of fourteen, and by a female at the age of twelve, and not ſooner. *Harg. Co. Litt.* 99.

(2) But if a perſon of ſound mind makes his will, this will is not revoked nor affected by his ſubſequent inſanity. 4 *Co.* 61.

prisoners,

priſoners, captives, and the like [s]. But the law of England does not make ſuch perſons abſolutely inteſtable; but only leaves it to the diſcretion of the court to judge, upon the conſideration of their particular circumſtances of dureſs, whether or no ſuch perſons could be ſuppoſed to have *liberum animum teſtandi*. And, with regard to feme-coverts, our law differs ſtill more materially from the civil. Among the Romans there was no diſtinction; a married woman was as capable of bequeathing as a feme-ſole [t]. But with us a married woman is not only utterly incapable of deviſing *lands*(3), [498] being excepted out of the ſtatute of wills, 34 & 35 Hen. VIII. c. 5. but alſo ſhe is incapable of making a teſtament of *chattels*, without the licence of her huſband. For all her perſonal chattels are abſolutely his; and he may diſpoſe of her chattels real, or ſhall have them to himſelf if he ſurvives her: it would be therefore extremely inconſiſtent, to give her a power of defeating that proviſion of the law, by bequeathing thoſe chattels to another [v]. Yet by her huſband's licence ſhe may make a teſtament [u]; and the huſband, upon marriage, frequently covenants with her friends to allow her that licence: but ſuch licence is more properly his aſſent (4); for, unleſs it be given to the particular will in queſtion, it will not be a complete teſtament, even though the huſband beforehand hath given her permiſſion to make a will [w]. Yet it ſhall be ſufficient to repel the huſband from his general right of adminiſtering his wife's effects; and adminiſtration ſhall be granted to her appointee, with ſuch teſtamentary paper annexed [x]. So that in reality the woman makes no will at all, but only ſomething like a will [y]; operating in the nature of

s Godolph. p. 1. c. 9.
t *Ff.* 31. 1. 77.
v 4 Rep. 51.
u Dr & St. d. 1. c. 7.
w Bro. *Abr. tit. deviſe.* 34. Stra. 891.
x *The king v. Betteſworth.* T. 13 Geo. II. B. R.
y Cro. Car. 376. 1 Mod. 211.

(3) See page 375, note 1, *ante*.

(4) Where perſonal property is given to a married woman for her ſole and ſeparate uſe, ſhe may diſpoſe of it by will without the aſſent of her huſband. 3 *Bro.* 8.

an appointment, the execution of which the husband by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law. For, though a son who was *in potestate parentis* could not by any means make a formal and legal testament, even though his father permitted it [z], yet he might, with the like permission of his father, make what was called a *donatio mortis causa* [a]. The queen consort is an exception to this general rule, for she may dispose of her chattels by will, without the consent of her lord [b]: and any feme-covert may make her will of goods, which are in her possession *in auter droit*, as executrix or administratrix; for these can never be the property of the husband [c]: and, if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by
[499] testament, without the control of her husband [d]. But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will [e] (5).

3. PERSONS incapable of making testaments, on account of their criminal conduct, are in the first place all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act aad manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture [f]. Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time [g]. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from

[z] *Ff.* 28. 1. 6.
[a] *Ff.* 39. 6. 25.
[b] Co. Litt. 133.
[c] Godolph. 1. 10.
[d] Prec. Chan. 44.
[e] 4 Rep. 60. 2 P. Wms. 624.
[f] Plowd. 261.
[g] Fitz. *Abr.* t. *descent.* 16.

(5) And it cannot be revived by the subsequent death of her husband. 2 *T. R.* 695.

making

making teſtaments, (as uſurers, libellers, and others of a worſe ſtamp) by the common law their teſtaments may be good [h]. And in general the rule is, and has been ſo at leaſt ever ſince Glanvil's time [j], *quod libera ſit cujuſcunque ultima voluntas.*

LET us next, *thirdly*, conſider what this laſt will and teſtament is, which almoſt every one is thus at liberty to make; or, what are the nature and incidents of a teſtament. Teſtaments both Juſtinian [i] and ſir Edward Coke [k] agree to be ſo called, becauſe they are *teſtatio mentis:* an etymon, which ſeems to ſavour too much of the conceit; it being plainly a ſubſtantive derived from the verb *teſtari*, in like manner as *juramentum*, *incrementum*, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis noſtrae juſta ſententia de eo, quod quis* "*poſt mortem ſuam fieri velit* [l]:" which may be thus rendered into Engliſh, "the legal declaration of a man's intentions, "which he wills to be performed after his death." It is called *ſententia* to denote the circumſpection and prudence with [500]
which it is ſuppoſed to be made: it is *voluntatis noſtrae ſententia*, becauſe it's efficacy depends on it's declaring the teſtator's intention, whence in England it is emphatically ſtiled his *will:* it is *juſta ſententia;* that is, drawn, atteſted, and publiſhed, with all due ſolemnities and forms of law: it is *de eo, quod quis poſt mortem ſuam fieri velit*, becauſe a teſtament is of no force till after the death of the teſtator.

THESE teſtaments are divided into two ſorts; *written*, and *verbal* or *nuncupative;* of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the teſtator *in extremis* before a ſufficient number of witneſſes, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing, is a ſupplement to a will; or an addition made by the teſtator, and annexed to, and to

h Godolph. p. 1. c. 12.
j *l.* 7. c. 5.
i *Inſt.* 2. 10.
k 1 Inſt. 111. 322.
l *Ff.* 28. 1. 1.

be taken as part of, a teſtament: being for it's explanation, or alteration, or to make ſome addition to, or elſe ſome ſubtraction from, the former diſpoſitions of the teſtator [m]. This may alſo be either written or nuncupative.

BUT, as *nuncupative* wills and codicils, (which were formerly more in uſe than at preſent, when the art of writing is become more univerſal) are liable to great impoſitions and may occaſion many perjuries, the ſtatute of frauds, 29 Car. II. c. 3. hath laid them under many reſtrictions; except when made by mariners at ſea, and ſoldiers in actual ſervice. As to all other perſons, it enacts; 1. That no written will ſhall be revoked or altered by a ſubſequent nuncupative one, except the ſame be in the lifetime of the teſtator reduced to writing, and read over to him, and approved; and unleſs the ſame be proved to have been ſo done by the oaths of three witneſſes at the leaſt; who, by ſtatute 4 & 5 Ann. c. 16. muſt be ſuch as are admiſſible upon trials at common law. 2. That no nuncupative will ſhall in any wiſe be good, where the eſtate bequeathed exceeds 30*l.*; unleſs proved by three ſuch witneſſes, preſent at the making thereof, (the Roman law requiring ſeven [n]) and unleſs they or ſome of them were ſpe-
[501] cially required to bear witneſs thereto by the teſtator himſelf; and unleſs it was made in his laſt ſickneſs, in his own habitation or dwelling-houſe, or where he had been previouſly reſident ten days at the leaſt, except he be ſurprized with ſickneſs on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will ſhall be proved by the witneſſes after ſix months from the making, unleſs it were put in writing within ſix days. Nor ſhall it be proved till fourteen days after the death of the teſtator, nor till proceſs hath firſt iſſued to call in the widow, or next of kin, to conteſt it, if they think proper. Thus hath the legiſlature provided againſt any frauds in ſetting up nuncupative wills, by ſo numerous a train of requiſites, that the thing itſelf has fallen into diſuſe; and is hardly ever heard of, but in the only inſtance

m Godolph. p. 1. c. 1. § 3.

n *Inſt.* 2. 10. 4.

where

where favour ought to be ſhewn to it, when the teſtator is ſurprized by ſudden and violent ſickneſs. The teſtamentary words muſt be ſpoken with an intent to bequeath, not any looſe idle diſcourſe in his illneſs; for he muſt require the by-ſtanders to bear witneſs of ſuch his intention: the will muſt be made at home, or among his family or friends, unleſs by unavoidable accident; to prevent impoſitions from ſtrangers: it muſt be in his *laſt* ſickneſs; for, if he recovers, he may alter his diſpoſitions, and has time to make a written will: it muſt not be proved at too long a diſtance from the teſtator's death, leſt the words ſhould eſcape the memory of the witneſſes; nor yet too haſtily and without notice, leſt the family of the teſtator ſhould be put to inconvenience, or ſurprized.

As to *written* wills, they need not any witneſs of their publication. I ſpeak not here of deviſes of lands, which are quite of a different nature; being conveyances by ſtatute, unknown to the feodal or common law, and not under the ſame juriſdiction as perſonal teſtaments. But a teſtament of chattels, written in the teſtator's own hand, though it has neither his name nor ſeal to it, nor witneſſes preſent at it's publication, is good; provided ſufficient proof can be had that it is his hand-writing [o]. And though written in another man's hand, and never ſigned by the teſtator, yet if proved to be according to his inſtructions and approved by him, it hath been held a good teſtament of the perſonal eſtate [p]. Yet it is the ſafer and more prudent way, and leaves leſs in the breaſt of the eccleſiaſtical judge, if it be ſigned or ſealed by the teſtator, and publiſhed in the preſence of witneſſes: which laſt was always required in the time of Bracton [q]; or, rather, he in this reſpect has implicitly copied the rule of the civil law. [502]

No teſtament is of any effect till after the death of the teſtator. "*Nam omne teſtamentum morte conſummatum eſt: et* "*voluntas teſtatoris eſt ambulatoria uſque ad mortem* [r]." And

[o] Godolph. p. 1. c. 21. Gilb. Rep. 260.

[p] Comyns. 452, 3, 4.

[q] *l.* 2. c. 26.

[r] Co. Litt. 112.

therefore,

therefore, if there be many teftaments, the laft overthrows all the former [s]: but the republication of a former will revokes one of a later date, and eftablifhes the firft again [t].

HENCE it follows, that teftaments may be avoided three ways: 1. If made by a perfon labouring under any of the incapacities before-mentioned; 2. By making another teftament of a later date: and, 3. By cancelling or revoking it. For, though I make a laft will and teftament irrevocable in the ftrongeft words, yet I am at liberty to revoke it: becaufe my own act or words, cannot alter the difpofition of law, fo as to make that irrevocable, which is in it's own nature revocable [u]. For this, faith lord Bacon [w], would be for a man to deprive himfelf of that, which of all other things is moft incident to human condition; and that is, alteration or repentance. It hath alfo been held, that, without an exprefs revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a prefumptive or implied revocation of his former will, which he made in his ftate of celibacy [x] (6.) The Romans were alfo wont to fet afide teftaments as being *inofficiofa*, deficient in natural duty, if they difinherited or totally paffed by (without affigning a true and
[503] fufficient reafon [y]) any of the children of the teftator [z]. But if the child had any legacy, though ever fo fmall, it was a proof that the teftator had not loft his memory or his reafon, which otherwife the law prefumed; but was then fuppofed to have acted thus for fome fubftantial caufe: and in fuch cafe no *querela inofficiofi teftamenti* was allowed. Hence probably has arifen that groundlefs vulgar error, of the neceffity of leaving the heir a fhilling (7) or fome other exprefs legacy, in

[s] Litt. § 168. Perk. 478.
[t] Perk. 479.
[u] 8 Rep. 82.
[w] Elem. c. 19.
[x] Lord Raym. 441. 1 P. Wms. 204.
[y] See book I. ch. 16.
[z] *Inft.* 2. 18. 1.

(6) Marriage, and the birth of a pofthumous child, amount to a revocation of a will made previous to the marriage. 5 *T. R.* 49.

(7) This, I conceive, feldom proceeds from ignorance, but in general is the laft effufion of an unforgiving fpirit, defirous of leaving

order to disinherit him effectually: whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament.

WE are next to consider, *fourthly*, what is an executor, and what an administrator; and how they are both to be appointed.

AN executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts, and infants: nay, even infants unborn, or *in ventre sa mere*, may be made executors [a]. But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minore aetate* [b]. In like manner as it may be granted *durante absentia*, or *pendente lite*; when the executor is out of the realm [c], or when a suit is commenced in the ecclesiastical court touching the validity of the will [d]. This appointment of an executor is essential to the making of a will [e]: and it may be performed either by express words, or such as strongly imply the same. But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases, the ordinary must grant administration *cum testamento annexo* [f] to some other per- [504]
son; and then the duty of the administrator, as also when he is constituted only *durante minore aetate*, &c. of another, is very little different from that of an executor. And this was law so early as the reign of Henry II; when Glanvil [g]

[a] West. Symb. p. 1. § 635.
[b] Went. Off. Ex. c. 18.
[c] 1 Lutw. 342.
[d] 2 P. Wms. 589, 590.
[e] Went. c. 1. Plowd. 281.
[f] 1 Roll. Abr. 907. Comb. 20.
[g] *l.* 7. *c.* 6.

ing an insult upon record, when it has ceased to produce either injury or disappointment.

informs

informs us, that "*testamenti executores esse debent ii, quos testa-" "tor ad hoc elegerit, et quibus curam ipse commiserit: si vero" "testator nullos ad hoc nominaverit, possunt propinqui et con-" "sanguinei ipsius defuncti ad id faciendum se ingerere.*"

BUT if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the third and Henry the eighth, before-mentioned, direct. In consequence of which we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband, or his representatives [h]: and of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his discretion [i]. 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases [k]. 3. That this *nearness* or propinquity of degree shall be reckoned according to the computation of the civilians [l]; and not of the canonists, which the law of England adopts in the descent of real estates [m] (8): because in the civil computation the intestate himself is the *terminus, a quo* the several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration: both which are indeed in the first degree; but with us [n] the children are allowed the preference [o]. Then

[h] Cro. Car. 106. Stat. 29 Car. II. c. 3. 1 P. Wms. 381.

[i] Salk. 36. Stra. 532.

[k] See page 496.

[l] Prec. Chanc. 593.

[m] See pag. 203. 207. 224.

[n] Godolph. p. 2. c. 34. § 1. 2 Vern. 125.

[o] In Germany there was a long dispute whether a man's children should inherit his effects during the life of their grandfather; which depends (as we shall see

(8) See page 224, note 12, where the Editor endeavours to shew that the canon law computation is of no avail whatever in the descent of real estates.

follow brothers [p], grandfathers [q], uncles or nephews [r], (and the females of each claſs reſpectively) and laſtly couſins. 4. The half blood is admitted to the adminiſtration as well as the whole; for they are of the kindred of the inteſtate, and only excluded from inheritances of land upon feodal reaſons. Therefore the brother of the half blood ſhall exclude the uncle of the whole blood [s]; and the ordinary may grant adminiſtration to the ſiſter of the half, or the brother of the whole blood, at his own diſcretion [t]. 5. If none of the kindred will take out adminiſtration, a creditor may, by cuſtom, do it [u]. 6. If the executor refuſes, or dies inteſtate, the adminiſtration may be granted to the reſiduary legatee, in excluſion of the next of kin [w]. 7. And, laſtly, the ordinary may, in defect of all theſe, commit adminiſtration (as he might have done [x] before the ſtatute of Edward III) to ſuch diſcreet perſon as he approves of: or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor adminiſtrator; his only buſineſs being to keep the goods in his ſafe cuſtody [y], and to do other acts for the benefit of ſuch as are entitled to the property of the deceaſed [z]. If a baſtard, who has no kindred, being *nullius filius*, or any one elſe that has no kindred, dies inteſtate, and without wife or child, it hath formerly been held [a] that the ordinary might ſeiſe his goods and diſpoſe of them *in pios uſus*. But the uſual courſe now is for ſome one to procure letters patent, or other authority from the king; and then the ordi-

ſee hereafter) on the ſame principles as the granting of adminiſtrations. At laſt it was agreed at the diet of Arenſberg, about the middle of the tenth century, that the point ſhould be decided by combat. Accordingly, an equal number of champions being choſen on both ſides, thoſe of the children obtained the victory; and ſo the law was eſtabliſhed in their favour, that the iſſue of a perſon deceaſed ſhall be entitled to his goods and chattels in preference to his parents. (Mod. Un. Hiſt. xxix. 28.)

p Harris *in Nov.* 118. *c.* 2.

q Prec. Chanc. 527. 1 P. Wms. 41.

r Atk. 455.

s 1 Ventr. 425.

t Aleyn. 36. Styl. 74.

u Salk. 38.

w 1 Sid. 281. 1 Ventr. 219.

x Plowd. 278.

y Wentw. ch. 14.

z 2 Inſt. 398.

a Salk. 37.

nary

nary of courſe grants adminiſtration to ſuch appointee of the crown [b] (9).

THE intereſt, veſted in the executor by the will of the deceaſed, may be continued and kept alive by the will of the ſame executor: ſo that the executor of A's executor is to all intents and purpoſes the executor and repreſentative of A himſelf [c]; but the executor of A's adminiſtrator, or the adminiſtrator of A's executor, is not the repreſentative of A [d]. For the power of an executor is founded upon the ſpecial confidence and actual appointment of the deceaſed; and ſuch executor is therefore allowed to tranſmit that power to another, in whom he has equal confidence: but the adminiſtrator of A is merely the officer of the ordinary, preſcribed to him by act of parliament, in whom the deceaſed has repoſed no truſt at all; and therefore, on the death of that officer, it reſults back to the ordinary to appoint another. And, with regard to the adminiſtrator of A's executor, he has clearly no privity or relation to A; being only commiſſioned to adminiſter the effects of the inteſtate executor, and not of the original teſtator. Wherefore in both theſe caſes, and whenever the courſe of repreſentation from executor to executor is interrupted by any one adminiſtration, it is neceſſary for the ordinary to commit adminiſtration afreſh, *of the goods* of the deceaſed *not* adminiſtered by the former executor or adminiſtrator. And this adminiſtrator, *de bonis non*, is the only legal repreſentative of the deceaſed in matters of perſonal property [e]. But he may, as well as an original

b 3 P. Wms. 33.

c Stat. 25 Edw. III. ſt. 5. c. 5. 1 Leon. 275.

d Bro, *Abr. tit. adminiſtrator*. 7.

e Styl. 225.

(9) Where a baſtard dies inteſtate without wife or iſſue, the king is entitled to his perſonal property as adminiſtrator; but it is uſual for the crown to grant the adminiſtration of it to ſome relation of the baſtard's father or mother, reſerving one tenth or other ſmall proportion of it. 1 *Woodd*. 398.

adminiſtrator,

administrator, have only a *limited* or *special* administration committed to his care, *viz.* of certain specific effects, such as a term of years and the like; the rest being committed to others [f].

HAVING thus shewn what is, and who may be, an executor or administrator, I proceed now, *fifthly* and lastly, to inquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and secondly, that an executor may do many acts before he proves the will [g] (10), but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate [h], the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased [i], and many other transactions [k]) he is called in law an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corps of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong [l]. Such a one cannot bring an [507]

f 1 Roll. Abr. 908. Godolph. p. 2. c. 30. Salk. 36.

g Wentw. ch. 3.

h Comyns. 151.

i 5 Rep. 33, 34.

k Wentw. ch. 14. Stat. 43 Eliz. c. 8.

l Dyer. 166.

(10) He may commence an action, but he cannot declare in the action, before probate; for when he declares, he must produce in court the letters testamentary. And he may release or pay a debt; may assent to a legacy, and be sued before probate; and do other acts, which seem to be fully enumerated in 1 *Salk.* 299, and *Com. Dig. Admin.* B. 9.

action

action himſelf in right of the deceaſed [m], but actions may be brought againſt him. And, in all actions by creditors, againſt ſuch an officious intruder, he ſhall be named an executor, generally [n]; for the moſt obvious concluſion, which ſtrangers can form from his conduct, is that he hath a will of the deceaſed, wherein he is named executor, but hath not yet taken probate thereof [o]. He is chargeable with the debts of the deceaſed, ſo far as aſſets come to his hands [p]: and, as againſt creditors in general, ſhall be allowed all payments made to any other creditor in the ſame or a ſuperior degree [q],
[508] himſelf only excepted [r]. And though, as againſt the rightful executor or adminiſtrator, he cannot plead ſuch payment, yet it ſhall be allowed him in mitigation of damages [s]; unleſs perhaps upon a deficiency of aſſets, whereby the rightful executor may be prevented from ſatisfying his own debt [t] (11). But let us now ſee what are the power and duty of a rightful executor or adminiſtrator.

1. HE muſt *bury* the deceaſed in a manner ſuitable to the eſtate which he leaves behind him. Neceſſary funeral expenſes are allowed, previous to all other debts and charges; but if the executor or adminiſtrator be extravagant, it is a ſpecies of *devaſtation* or waſte of the ſubſtance of the deceaſed, and ſhall only be prejudicial to himſelf, and not to the creditors or legatees of the deceaſed [u].

m Bro. *Abr. t. adminiſtrator*. 8.
n 5 Rep. 31.
o 12 Mod. 471.
p Dyer. 166.
q 1 Chan. Caſ. 33.
r 5 Rep. 30. Moor. 527.
s 12 Mod. 441. 471.
t Wentw. ch. 14.
u Salk. 196. Godolph. p. 2. c. 26. §2.

(11) It is held, that the leaſt intermeddling with the effects of the inteſtate, even milking cows, or taking a dog, will conſtitute an executor *de ſon tort*. *Dy*. 166. An executor of his own wrong will be liable to an action, unleſs he has delivered over the goods of the inteſtate to the rightful adminiſtrator before the action is brought againſt him. And he cannot retain the inteſtate's property in diſcharge of his own debt, although it is a debt of a ſuperior degree. 3 *T. R.* 590. 2 *T. R.* 100.

2. THE

2. THE executor, or the adminiſtrator *durante minore aetate*, or *durante abſentia*, or *cum teſtamento annexo*, muſt *prove the will* of the deceaſed: which is done either in *common form*, which is only upon his own oath before the ordinary, or his ſurrogate; or *per teſtes*, in more ſolemn form of law, in caſe the validity of the will be diſputed [w]. When the will is ſo proved, the original muſt be depoſited in the regiſtry of the ordinary; and a copy thereof in parchment is made out under the ſeal of the ordinary, and delivered to the executor or adminiſtrator, together with a certificate of it's having been proved before him: all which together is uſually ſtiled the *probate*. In defect of any will, the perſon entitled to be adminiſtrator muſt alſo at this period take out letters of adminiſtration under the ſeal of the ordinary; whereby an executorial power to collect and adminiſter, that is, diſpoſe of the goods of the deceaſed, is veſted in him: and he muſt, by ſtatute 22 & 23 Car. II. c. 10. enter into a bond with ſureties, faithfully to execute his truſt. If all the goods of the deceaſed lie within the ſame juriſdiction, a probate before the ordinary, or an adminiſtration granted by him, are the only [509]
proper ones: but if the deceaſed had *bona notabilia*, or chattels to the value of a *hundred ſhillings*, in two diſtinct dioceſes or juriſdictions, then the will muſt be proved, or adminiſtration taken out, before the metropolitan of the province, by way of ſpecial prerogative [x]; whence the courts where the validity of ſuch wills is tried, and the offices where they are regiſtered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. Lyndewode, who flouriſhed in the beginning of the fifteenth century, and was official to arch-biſhop Chichele, interprets theſe hundred ſhillings to ſignify *ſolidos legales;* of which he tells us ſeventy-two amounted to a pound of gold, which in his time was valued at fifty nobles or 16*l.* 13*s.* 4*d.* He therefore computes [y] that the hundred ſhillings, which conſtituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* $0\frac{1}{4}$*d.* This will account for what is ſaid in our antient

[w] Godolph. p. 1. c. 20. § 4.

[x] 4 Inſt. 335.

[y] *Provinc. l.* 3. *t.* 13. *c. item. v. centum. &c. ſtatutum. v. laicis.*

 books,

books, that *bona notabilia* in the dioceſe of London [z], and indeed every where elſe [a], were of the value of ten pounds by *compoſition:* for, if we purſue the calculations of Lyndewode to their full extent, and conſider that a pound of gold is now almoſt equal in value to an hundred and fifty nobles, we ſhall extend the preſent amount of *bona notabilia* to nearly 70*l.* But the makers of the canons of 1603 underſtood this antient rule to be meant of the ſhillings current in the reign of James I, and have therefore directed [b] that *five pounds* ſhall for the future be the ſtandard of *bona notabilia,* ſo as to make the probate fall within the archiepiſcopal prerogative. Which prerogative (properly underſtood) is grounded upon this reaſonable foundation: that, as the biſhops were themſelves originally the adminiſtrators to all inteſtates in their own dioceſe, and as the preſent adminiſtrators are in effect no other than their officers or ſubſtitutes, it was impoſſible for the biſhops, or thoſe who acted under them, to collect any goods of the deceaſed, other than ſuch as lay within their
[510] own dioceſes, beyond which their epiſcopal authority extends not. But it would be extremely troubleſome, if as many adminiſtrations were to be granted, as there are dioceſes within which the deceaſed had *bona notabilia;* beſides the uncertainty which creditors and legatees would be at, in caſe different adminiſtrators were appointed, to aſcertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently veſted in the metropolitan of each province, to make in ſuch caſes one adminiſtration ſerve for all. This accounts very ſatisfactorily for the reaſon of taking out adminiſtration to inteſtates, that have large and diffuſive property, in the prerogative court: and the probate of wills naturally follows, as was before obſerved, the power of granting adminiſtrations; in order to ſatisfy the ordinary that the deceaſed has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of adminiſtring the effects.

[z] 4 Inſt. 335. Godolph. p. 2. c. 22.
[a] Plowd. 281.
[b] can. 92.

3. THE

3. THE executor or administrator is to make an *inventory*[c] of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. HE is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased[d], and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest[e]; but in case of administrators it is otherwise[f]. Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator[g]; that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands he may convert into [511] ready money, to answer the demands that may be made upon him (12): which is the next thing to be considered; for,

5. THE executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty[h]. Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in

c Stat. 21 Hen. VIII. c. 5.
d Co. Litt. 209.
e Dyer. 23.
f 1 Atk. 460.
g See pag. 244.
h 1 And. 129.

(12) The goods of a testator, in the possession of the executor, cannot be taken in execution of a judgment in an action brought against the executor in his own right. 4 *T. R.* 621.

woollen [i], money due upon poors rates [k], for letters to the post-office [l], and some others. Fourthly, debts of record; as judgments, (docquetted according to the statute 4 & 5 W. & M. c. 20.) statutes, and recognizances [m] (13). Fifthly, debts due on special contracts; as for rent, (for which the lessor has often a better remedy in his own hands, by distreining) or upon bonds, covenants, and the like, under seal [n] (14). Lastly, debts on simple contracts, *viz.* upon notes unsealed, and verbal promises. Among these simple contracts, servants wages are by some [o] with reason preferred to any other: and so stood the antient law, according to Bracton [p] and Fleta [q], who reckon, among the first debts to be paid, *servitia servientium et stipendia famulorum.* Among debts of equal degree, the executor or administrator is allowed to pay himself first; by retaining in his hands so much as his debt amounts to [r]. But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law [s]. If a
[512] creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no [t]; provided there be assets sufficient to pay the testator's debts: for, though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary [u]. Also, if no suit is commenced against him, the executor

i Stat. 30 Car. II. c. 3.
k Stat. 17 Geo. II. c. 38.
l Stat. 9 Ann. c. 10.
m 4 Rep. 60. Cro. Car. 363.
n Wentw. ch. 12.
o 1 Roll. Abr. 927.
p *l.* 2. *c.* 26.
q *l.* 2. *c.* 56. § 10.
r 10 Mod. 496. See vol. III. p. 18.
s 5 Rep. 30.
t Plowd. 184. Salk. 299.
u Salk. 303. 1 Roll. Abr. 921.

(13) To this class of debts must be added a decree of a court of equity. 3 *P. Wms.* 401.

(14) A court of equity will order voluntary bonds or other special contracts, without consideration, to be postponed to simple contract debts. 3 *P. Wms.* 222.

may

may pay any one creditor in equal degree his whole debt, though he has nothing left for the reſt: for, without a ſuit commenced, the executor has no legal notice of the debt[w] (15).

[w] Dyer, 32. 2 Leon. 60.

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(15) After a ſuit is commenced, the executor or adminiſtrator may ſtill give a preference to other creditors of the ſame degree, by confeſſing a judgment to them for the real amount of their debts. 1 *P. Wms.* 295. But after a bill is filed by a creditor for a diſcovery of aſſets and payment of his debt, the executor or adminiſtrator may pay another creditor of equal degree without confeſſing a judgment. 3 *P. Wms.* 401.

The courſe of adminiſtration or payment of the debts according to their priority applies only to legal aſſets; but as natural equity requires that all the creditors of the teſtator ſhould be paid equally, when therefore the teſtator leaves his real eſtates to truſtees or to executors, who thus become truſtees for the payment of his debts, theſe are called equitable aſſets, becauſe a court of equity will order all the creditors to be paid *pari paſſu*, or an equal ſhare out of this fund. 1 *Bro.* 138. 2 *Atk.* 50.

And even where ſpecialty creditors have received part of their debts out of the perſonal eſtate, a court of equity will reſtrain them from receiving any part of the equitable fund, till all the other creditors are paid an equal proportion of their debts. 3 *P. Wms.* 322.

The perſonal eſtate is ſaid to be the natural fund for the payment of debts, yet it will be exonerated if the teſtator leaves by his will ſufficient real property for the payment of his debts, provided it is the manifeſt intention that the perſonal eſtate ſhall be exonerated, and that the real eſtate ſhall be alone applied to that purpoſe. 1 *Bro.* 462. 2 *Bro.* 60.

If lands deſcend to the heir charged by the teſtator with his debts, there it ſhall be liable to all his debts, although it ſhall be conſidered as legal aſſets, and they ſhall be paid according to their priority. 2 *Atk.* 290. 1 *P. Wms.* 430. The equity of redemption of lands, mortgaged in fee, is equitable aſſets; for the creditors can have no relief from it but in a court of equity. 2 *Atk.* 290.

All ſpecialty creditors, where the teſtator has bound himſelf and his heirs, have their election, whether they will reſort to the heir,

6. WHEN the debts are all difcharged, the *legacies* claim the next regard; which are to be paid by the executor fo far as his affets will extend; but he may not give himfelf the preference herein, as in the cafe of debts [x].

A LEGACY is a bequeft, or gift, of goods and chattels by teftament; and the perfon to whom it was given is ftiled the legatee: which every perfon is capable of being, unlefs particularly difabled by the common law or ftatutes, as traitors, papifts, and fome others. This bequeft transfers an inchoate property to the legatee; but the legacy is not perfect without the affent of the executor: for if I have a *general* or *pecuniary* legacy of 100*l*, or a *fpecific* one of a piece of plate, I cannot in either cafe take it without the confent of the executor [y] (16). For in him all the chattels are vefted; and it is

[x] 2 Vern. 434. 2 P. Wms. 25.

[y] Co. Litt. 111. Aleyn. 39.

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who has lands by defcent, or to the executor, for payment of their debts; and although a court of equity will not interpofe it's authority, and compel the fpecialty creditors to apply to the heir, yet if they exhauft the perfonal fund, or leave infufficient for the difcharge of the fimple contract creditors and legatees, it will enable thefe to ftand in the place of the fpecialty creditors, and to recover from the heir at law the amount of what they have drawn out of the perfonal fund. 1 *Vef.* 312. This is called marfhalling the affets. If a perfon mortgages an eftate and dies, the heir at law fhall have the eftate exonerated, or the mortgage difcharged by the perfonal reprefentative out of the perfonal eftate, provided it does not interfere with other debts and legacies, for the perfonal eftate has been augmented to that extent in confequence of the mortgage; and therefore the heir at law fhall not have the benefit of the perfonal eftate to difcharge a mortgage, which was not brought upon the eftate by the teftator or inteftate. 2 *Cox's P. Wms.* 664. 2 *Bro.* 101.

If a teftator having mortgaged an eftate devifes it by will, and permits other lands to defcend to his heir, the devifee fhall have the eftate devifed to him exonerated out of the perfonal eftate, and if that is infufficient by the heir at law. 2 *Atk.* 430.

(16) If an executor, in confideration of affets of the teftator in his poffeffion, promifes to pay a legacy to the legatee, an action of

affumpfit

his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our antient law [z], "*de bonis defuncti primo deducenda sunt ea quae sunt necessitatis* "*et postea quae sunt utilitatis, et ultimo quae sunt voluntatis.*" And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts; but a *specific* legacy (of a piece of plate, a horse, or the like) [513] is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it [a]. Upon the same principle, if the legatees had been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid [b]. And this law is as old as Bracton and Fleta, who tell us [c], "*si plura sint debita, vel plus legatum fuerit, ad quae catalla defuncti non sufficiant, fiat ubique* "*defalcatio, excepto regis privilegio.*"

If the legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*. And if a *contingent* legacy be left to any one; as *when* he attains, or *if* he attains, the age of twenty-one; and he dies before that time; it is a lapsed legacy [d]. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in praesenti*, although it be *solvendum in futuro* (17): and, if the legatee dies before that

z *l.* 2. *c.* 26.
a 2 Vern. 111.
b *Ibid.* 205.
c Bract. *l.* 2. *c.* 26. Flet. *l.* 2. *c.* 57. §. 11.
d Dyer. 59. 1 Equ. Cas. abr. 295.

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assumpsit may be brought against him in his own right. *Cowp.* 284. 289.

(17) If the legacy is given when, or if the legatee attains a certain age, or to him *at* that age, the time is said to be annexed to the substance of the legacy, and it is not vested or transmissible to his representatives if the legatee dies before that age; but if it is payable at that age, or when, or if he attains it, the time is said

age, his repreſentatives ſhall receive it out of the teſtator's perſonal eſtate, at the ſame time that it would have become payable, in caſe the legatee had lived (18). This diſtinction is borrowed from the civil law[e]; and it's adoption in our courts is not ſo much owing to it's intrinſic equity, as to it's having been before adopted by the eccleſiaſtical courts. For, ſince the chancery has a concurrent juriſdiction with them, in regard to the recovery of legacies, it was reaſonable that there ſhould be a conformity in their determinations; and that the ſubject ſhould have the ſame meaſure of juſtice in whatever court he ſued[f]. But if ſuch legacies be charged upon a real eſtate, in both caſes they ſhall lapſe for the benefit of the

[e] *Ff.* 35. 1. 1 & 2. [f] 1 Equ. Caſ. abr. 295.

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to be annexed to the payment only, and the legacy is veſted and tranſmiſſible though he ſhould die without ever arriving at that age. 2 *Atk.* 128. This a trifling diſtinction, and underſtood or attended to by few teſtators, who make their own wills. If the teſtator gives a legacy without referring the time to the payment, it will notwithſtanding be veſted, if he gives the intereſt until that time. 2 *Bro.* 3. But this rule will not extend to a maintenance leſs than the intereſt. 3 *Bro.* 416. But if lands are deviſed, *when* the deviſee attains a certain age, the intereſt in the eſtate will be veſted, and upon the death of the deviſee before that age, will deſcend to his heir. 3 *T. R.* 41.

(18) But where a legacy is given to another, in caſe the firſt legatee dies under twenty-one or a certain age, the legacy muſt be paid upon the death of the infant. And where it is not given over to another, if it bears intereſt, his repreſentative ſhall be entitled to it immediately; but if the intereſt allowed by the teſtator is leſs than the intereſt allowed by a court of equity, the executor of the teſtator ſhall be entitled to the difference until the firſt legatee would have arrived at the age preſcribed by the teſtator. 2 *P. Wms.* 478. 1 *Bro.* 105.

A bequeſt of a reſidue or fund to all the children of A, to be paid when they ſhall attain the age of twenty-one, muſt be divided among thoſe only who are in exiſtence, when the eldeſt attains that age. 3 *Bro.* 404.

heir:

heir[g]: for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction (19). And, in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; [514] but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator[h] (20).

BESIDES these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a donation *causa mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker,) to keep in case of his decease (21). This gift, if

g 2 P. Wms. 601. h 2 P. Wms. 26, 27.

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(19) It is generally true, that both portions created by deed or will, and legacies which are to be raised out of real property, and to be paid upon a future day, shall never be raised if the person to whom they are given dies before the day of payment. But legacies and portions in a will shall be raised, if the time of payment is postponed on account of the circumstances of the testator's estate, and not on account of the circumstances of the legatee; or where it is the apparent intention of the testator, notwithstanding the death of the legatee prior to the time specified. If the portions are to be raised out of land, and no time is limited, although the cases upon the subject are contradictory, it seems they shall sink into the estate, if the children die before they are wanted. See the cases upon this subject fully collected in 2 *Cox's P. Wms.* 612, and *Harg. Co. Litt.* 237.

(20) A pecuniary legacy, given by a parent to a legitimate child, shall carry interest from the death of the testator; otherwise the child might perish within the year for want of maintenance. 1 *Ves.* 310.

(21) There may be a *donatio causa mortis* of bonds, bank-notes, and bills, payable to bearer, but not of other promissory notes or bills

the donor dies, needs not the aſſent of his executor: yet it ſhall not prevail againſt creditors; and is accompanied with this implied truſt, that, if the donor lives, the property thereof ſhall revert to himſelf, being only given in contemplation of death, or *mortis cauſa*[i]. This method of donation might have ſubſiſted in a ſtate of nature, being always accompanied with delivery of actual poſſeſſion[k]; and ſo far differs from a teſtamentary diſpoſition: but ſeems to have been handed to us from the civil lawyers[l], who themſelves borrowed it from the Greeks[m].

7. WHEN all the debts and particular legacies are diſcharged, the ſurplus or *reſiduum* muſt be paid to the reſiduary legatee, if any be appointed by the will; and if there be none, it was long a ſettled notion that it devolved to the executor's own uſe, by virtue of his executorſhip[n]. But whatever ground there might have been formerly for his opinion, it ſeems now to be underſtood[o] with this reſtriction; that although where the executor has no legacy at all the *reſiduum* ſhall in general be his own, yet wherever there is ſufficient
[515] on the face of a will, (by means of a competent legacy or otherwiſe,) to imply that the teſtator intended his executor ſhould *not* have the reſidue, the undeviſed ſurplus of the eſtate ſhall go to the next of kin, the executor then ſtanding upon exactly the ſame footing as an adminiſtrator (22): concerning

i Prec. Chanc. 269. 1 P. Wms. 406. 441. 3 P. Wms. 357.

k Law of forfeit. 16.

l *Inſt.* 2. 7. 1. *Ff. l.* 39. *t.* 6.

m There is a very complete *donatio mortis cauſa*, in the Odyſſey, b. 17. v. 78. made by Telemachus to his friend Piraeus: and another by Hercules, in the Alceſtes of Euripides, v. 1020.

n Perkins. 525.

o Prec. Chanc. 323. 1 P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wms. 43. 194. Stra. 559. Lawſon v. Lawſon. *Dom. Proc.* 28 Apr. 1777.

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bills of exchange, theſe being choſes in action which cannot paſs by a delivery; 3 *P. Wms.* 357. and 2 *Veſ.* 431, where this ſubject is largely diſcuſſed by lord Hardwicke.

(22) Courts of equity now conſtrue executors to be truſtees for the next of kin in all caſes, where a fair inference can be collected from the expreſſions and circumſtances of the will, that ſuch

whom indeed there formerly was much debate[p], whether or no : could be compelled to make any distribution of the intestate's tate. For, though (after the administration was taken in fect from the ordinary, and transferred to the relations of the eceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, ey were prohibited by the temporal courts, and the bonds eclared void at law[q]. And the right of the husband not only o administer, but also to enjoy exclusively, the effects of his eceased wife, depends still on this doctrine of the common

p Godolph. p. 2. c. 32.

q 1 Lev. 233. Cart. 125. 2 P.Wms. 447.

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uch was the testator's intention. Where a legacy is given to a ole executor, it affords a reasonable conclusion, that the testator ntended to give him this alone as a satisfaction and recompense or his trouble; for it would be absurd to give him expressly a part, if it were intended that he should have the whole, or according to a quaint phraze, he cannot take all and some. And this inference is not repelled where a wife is the executrix, or the next of kin has also a legacy. But an exception out of a legacy in favour of an executor, does not raise such an implication as to exclude him from the benefit of the residue; as where the use of a service of plate is given to the executor for his life, and after his death it is bequeathed to another, for such an exception is perfectly consistent with the bequest of the residue, and the executor could not have had the benefit of the exception without a special description of it. So also where a legacy is given to one of two or more coexecutors, or where unequal legacies are given to co-executors, they shall take the residue, for this might be done by the testator not in favour of his next of kin, but with an intent to shew a preference to one above the others. See these distinctions, and the authorities, fully and clearly collected and stated in 1 *Cox's P. Wms.* 550.

If the testator gives the *residuum* to a person who dies in his lifetime, in consequence of which this bequest is lapsed, the executor, though he has no legacy, shall be a trustee for the next of kin, because the testator has expressed a manifest intention not to give it to his executor. 3 *Bro.* 28.

And it is probable that now the same would be held of every lapsed legacy and interest.

law:

law: the ſtatute of frauds declaring only, that the ſtatute of diſtributions does not extend to this caſe. But now theſe controverſies are quite at an end; for by the ſtatute 22 & 23 Car. II. c. 10. explained by 29 Car. II. c. 30. it is enacted, that the ſurpluſage of inteſtate's eſtates, (except of femes covert, which are left as at common law [r],) ſhall, after the expiration of one full year from the death of the inteſtate, be diſtributed in the following manner. One third ſhall go to the widow of the inteſtate, and the reſidue in equal proportions to his children, or if dead, to their repreſentatives; that is, their lineal deſcendants: if there are no children or legal repreſentatives ſubſiſting, then a moiety ſhall go to the widow, and a moiety to the next of kindred in equal degree and their repreſentatives: if no widow, the whole ſhall go to the children: if neither widow nor children, the whole ſhall be diſtributed among the next of kin in equal degree and their repreſentatives: but no repreſentatives are admitted, among collaterals, farther than the children of the inteſtate's brothers and ſiſters [s]. The next of kindred, here referred to, are to be inveſtigated by the ſame rules of conſanguinity, as thoſe who are entitled to letters of adminiſtration; of whom we have
[516] ſufficiently ſpoken [t]. And therefore by this ſtatute the mother, as well as the father, ſucceeded to all the perſonal effects of their children, who died inteſtate and without wife or iſſue: in excluſion of the other ſons and daughters, the brothers and ſiſters of the deceaſed. And ſo the law ſtill remains with reſpect to the father; but by ſtatute 1 Jac. II. c. 17, if the father be dead, and any of the children die inteſtate without wife or iſſue, in the lifetime of the mother, ſhe and each of the remaining children, or their repreſentatives, ſhall divide his effects in equal portions (23).

[r] Stat. 29 Car. II. c. 3. § 25.

[s] Raym. 496. Lord Raym. 571.

[t] pag. 504.

(23) The next of kin, who are to have the benefit of the ſtatute of diſtributions, muſt be aſcertained according to the computation of the civil law, including the relations both on the paternal and maternal ſides.

And

IT is obvious to obferve, how near a refemblance this ftatute of diftributions bears to our antient Englifh law, *de rationabili parte bonorum*, fpoken of at the beginning

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And when relations are thus found who are diftant from the inteftate by an equal number of degrees, they will fhare the perfonal property equally, although they are relations of very different denominations. As if the next of kin of the inteftate are great uncles or aunts, firft coufins, and great nephews or nieces, thefe being all related to the inteftate in the fourth degree will all be admitted to an equal diftributive fhare of his perfonal property. There is only one exception to this rule, *viz.* where the neareft relations are a grandfather or grandmother, and brothers or fifters, although all thefe are related in the fecond degree, yet the former fhall not participate with the latter; for which fingular exception it does not appear that any good reafon can be given. 3 *Atk.* 762. No difference is made between the whole and half blood in the diftribution of inteftate perfonal property. A curious queftion was agitated fome time ago refpecting the right to the adminiftration. General Stanwix and an only daughter were loft together at fea, and it was contended, that it was a rule of the civil law that when a parent and child perifh together, and the priority of their deaths is unknown, it fhall be prefumed that the child furvives the parent. And by this rule the right to the perfonal eftate of the general would have vefted in the daughter, and by her death in her next of kin, who on the part of the mother was a different perfon from the next of kin to her father.

But this being only an application for the adminiftration, and not for the intereft under the ftatute of diftributions, the court declined giving a judgment upon that queftion. 1 *Bl. R.* 640. And it does not appear that that point was ever determined in the fpiritual courts. But I fhould be inclined to think that our courts would require more than prefumptive evidence to fupport a claim of this nature. Some curious cafes *de commorientibus* may be feen in *Caufes Celebres*, 3 *Tom.* 412. *et feq.* In one of which, where a father and fon were flain together in a battle, and on the fame day the daughter became a profeffed nun, it was determined that her civil death was prior to the death of her father and brother, and that the brother having arrived at the age of puberty, fhould be prefumed to have furvived his father.

of

of this chapter [u]; and which sir Edward Coke [w] himſelf, though he doubted the generality of it's reſtraint on the power of deviſing by will, held to be univerſally binding (in point of conſcience at leaſt) upon the adminiſtrator or executor, in the caſe of either a total or partial inteſtacy. It alſo bears ſome reſemblance to the Roman law of ſucceſſions *ab inteſtato* [x]: which, and becauſe the act was alſo penned by an eminent civilian [y], has occaſioned a notion that the parliament of England copied it from the Roman praetor: though indeed it is little more than a reſtoration, with ſome refinements and regulations, of our old conſtitutional law; which prevailed as an eſtabliſhed right and cuſtom from the time of king Canute downwards, many centuries before Juſtinian's laws were known or heard of in the weſtern parts of Europe. So likewiſe there is another part of the ſtatute of diſtributions, where directions are given that no child of the inteſtate (except his heir at law) on whom he ſettled in his lifetime any eſtate in lands, or pecu-
[517] niary portion, equal to the diſtributive ſhares of the other children, ſhall have any part of the ſurpluſage with their brothers and ſiſters; but if the eſtates ſo given them, by way of advancement, are not quite equivalent to the other ſhares, the children ſo advanced ſhall now have ſo much as will make them equal. This juſt and equitable proviſion hath been alſo ſaid to be derived from the *collatio bonorum* of the imperial law [z]: which it certainly reſembles in ſome points, though it differs widely in others. But it may not be amiſs to obſerve, that, with regard to goods and chattels, this is part of the antient cuſtom of London, of the province of York, and of our ſiſter kingdom of Scotland: and, with regard to lands deſcending

[u] pag. 492.

[w] 2 Inſt. 33. See 1 P. Wms. 8.

[x] The general rule of ſuch ſucceſſions was this: 1. The children or lineal deſcendants in equal portions. 2. On failure of theſe, the parents or lineal aſcendants, and with them the brethren or ſiſters of the whole blood; or, if the parents were dead, all the brethren and ſiſters, together with the repreſentatives of a brother or ſiſter deceaſed. 3. The next collateral relations in equal degree. 4. The huſband or wife of the deceaſed. (*Ff.* 38. 15. 1. *Nov.* 118. *c.* 1, 2, 3. 127. *c.* 1.)

[y] Sir Walter Walker. Lord Raym. 574.

[z] *Ff.* 37. 6. 1.

in coparcenary, that it hath always been, and ſtill is, the common law of England, under the name of *hotchpot*[a].

BEFORE I quit this ſubject, I muſt however acknowlege, that the doctrine and limits of repreſentation, laid down in the ſtatute of diſtribution, ſeem to have been principally borrowed from the civil law: whereby it will ſometimes happen, that perſonal eſtates are divided *per capita*, and ſometimes *per ſtirpes;* whereas the common law knows no other rule of ſucceſſion but that *per ſtirpes* only[b]. They are divided *per capita*, to every man an equal ſhare, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repraeſentationis*, in the right of another perſon. As if the next of kin be the inteſtate's three brothers, A, B, and C; here his effects are divided into three equal portions, and diſtributed *per capita*, one to each: but if one of theſe brothers, A, had been dead leaving three children, and another, B, leaving two; then the diſtribution muſt have been *per ſtirpes; viz.* one third to A's three children, another third to B's two children; and the remaining third to C the ſurviving brother: yet if C had alſo been dead, without iſſue, then A's and B's five children, being all in equal degree to the inteſtate, would take in their own rights *per capita; viz.* each of them one fifth part[c] (24).

a See ch. 12. page 191.

b See ch. 14. page 217.

c Prec. Chanc. 54.

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(24) There is no repreſentation or diſtribution *per ſtirpes* but among immediate deſcendents and the children of brothers and ſiſters; for the ſtatute has expreſsly declared that no repreſentation ſhall be admitted among collaterals after brother's and ſiſter's children. *ſ.* 7. If therefore A the brother of the inteſtate be dead, leaving only grandchildren, and B be dead, leaving children, and C ſtill be living, the grandchildren of A ſhall have no ſhare, but one half will be given to the children of B, and the other half to C. 1 *P. Wms.* 25. If the inteſtate has a mother living, and brother's or ſiſter's children, they ſhall take *per ſtirpes* with the mother, who ſhall have in ſuch caſe the ſame ſhare as a brother or ſiſter. 1 *Atk.* 458.

THE

THE ſtatute of diſtributions expreſsly excepts and reſerves the cuſtom of the city of London, of the province of York, and of all other places having peculiar cuſtoms of diſtributing inteſtates' effects. So that, though in thoſe places the reſtraint of deviſing is removed by the ſtatutes formerly mentioned[d], their antient cuſtoms remain in full force, with reſpect to the eſtates of inteſtates. I ſhall therefore conclude this chapter, and with it the preſent book, with a few remarks on thoſe cuſtoms.

IN the firſt place we may obſerve, that in the city of London[e], and province of York[f], as well as in the kingdom of Scotland[g], and probably alſo in Wales, (concerning which there is little to be gathered, but from the ſtatute 7 & 8 W. III. c. 38.) the effects of the inteſtate, after payment of his debts, are in general divided according to the antient univerſal doctrine of the *pars rationabilis*. If the deceaſed leaves a widow and children, his ſubſtance (deducting for the widow's apparel and the furniture of her bed-chamber, which in London is called the *widow's chamber*) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the adminiſtrator: if only a widow, or only children, they ſhall reſpectively, in either caſe, take one moiety, and the adminiſtrator the other[h]; if neither widow nor child, the adminiſtrator ſhall have the whole[i]. And this portion, or *dead man*'s part, the adminiſtrator was wont to apply to his own uſe[k], till the ſtatute 1 Jac. II. c. 17. declared that the ſame ſhould be ſubject to the ſtatute of diſtribution. So that if a man dies worth 1800*l.* perſonal eſtate, leaving a widow and two children, this eſtate ſhall be divided into eighteen parts; whereof the widow ſhall have eight, ſix by the cuſtom and two by the ſtatute; and each of the children five, three by the cuſtom and two by the ſtatute: if he leaves a widow and one child, ſhe ſhall ſtill have eight parts, as before; and the child ſhall have ten, ſix by the cuſtom and four by the ſtatute: if

d page 493.
e Lord. Raym. 1329.
f 2 Burn. eccl. law. 746.
g *Ibid.* 782.
h 1 P. Wms. 341. Salk. 246.
i 2 Show. 175.
k 2 Freem. 85. 1 Vern. 133.

he leaves a widow and no child, the widow ſhall have three fourths of the whole, two by the cuſtom and one by the ſtatute; and the remaining fourth ſhall go by the ſtatute to the next of kin. It is alſo to be obſerved, that if the wife be provided for by a jointure before marriage, in bar of her cuſtomary part, it puts her in a ſtate of non-entity, with regard to the cuſtom only[l]; but ſhe ſhall be entitled to her ſhare of the dead man's part under the ſtatute of diſtributions, unleſs barred by ſpecial agreement[m]. And if any of the children are advanced by the father in his lifetime with any ſum of money (not amounting to their full proportionable part) they ſhall bring that portion into hotchpot with the reſt of the brothers and ſiſters, but not with the widow, before they are entitled to any benefit under the cuſtom[n]: but, if they are fully advanced, the cuſtom entitles them to no further dividend[o].

THUS far in the main the cuſtoms of London and of York agree: but, beſides certain other leſs material variations, there are two principal points in which they conſiderably differ. One is, that in London the ſhare of the children (or orphanage part) is not fully veſted in them till the age of twenty-one, before which they cannot diſpoſe of it by teſtament[p]: and, if they die under that age, whether ſole or married, their ſhare ſhall ſurvive to the other children; but after the age of twenty-one, it is free from any orphanage cuſtom, and in caſe of inteſtacy, ſhall fall under the ſtatute of diſtributions[q]. The other, that in the province of York, the heir at common law, who inherits any land either in fee or in tail, is excluded from any filial portion or reaſonable part[r]. But, notwithſtanding theſe provincial variations, the cuſtoms appear to be ſubſtantially one and the ſame. And, as a ſimilar policy formerly prevailed in every part of the iſland, we may fairly conclude the whole to be of Britiſh original; or, if derived from the Roman law of ſucceſſions,

l 1 Vern. 665. 3 P. Wms. 16.
m 1 Vern. 15. 2 Chanc. Rep. 252.
n 2 Freem. 279. 1 Equ. Caſ. abr. 155. 2 P. Wms. 526.
o 2 P. Wms. 527.
p 2 Vern. 558.
q Prec. Chanc. 537.
r 2 Burn. 754.

to have been drawn from that fountain much earlier than the time of Juſtinian, from whoſe conſtitutions in many points (particularly in the advantages given to the widow) it very conſiderably differs: though it is not improbable that the reſemblances which yet remain may be owing to the Roman uſages; introduced in the time of Claudius Caeſar, who eſtabliſhed a colony in Britain to inſtruct the natives in legal knowlege [s]; inculcated and diffuſed by Papinian, who preſided at York as *praefectus praetorio* under the emperor Severus and Caracalla [t]; and continued by his ſucceſſors till the final departure of the Romans in the beginning of the fifth century after Chriſt.

[s] Tacit. *Annal. l.* 12. *c.* 32.

[t] Selden. *in Fletam. cap.* 4. § 3.

THE END OF THE SECOND BOOK.

APPENDIX.

N°. I.

Vetus Carta FEOFFAMENTI.

SCIANT presentes et futuri, quod ego Willielmus, filius Willielmi de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere: **Habendam et Tenendam** totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: **Reddendo** et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta: **Et** ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. **In cujus** rei testimonium huic presenti carte sigillum meum apposui: **Hiis** testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, & aliis. **Data** apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI sexto.

Premises. *Habendum*, and *Tenendum*. *Reddendum*, Warranty. Conclusion.

(L. S.)

Memorandum, quod die et anno infrascriptis plena et pacifica seisina acre infraspecificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford, Johannis de Seybroke, et aliorum.

Livery of seisin endorsed.

N°. II.

No. II.

No. II.

A modern Conveyance by LEASE *and* RELEASE.

§. 1. LEASE, *or* BARGAIN *and* SALE, *for a year.*

Premises. **This Indenture**, made the third day of September, in the twenty-first year of the reign of our sovereign lord GEORGE the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord, one thousand, seven hundred, and forty-seven, between Abraham Barker of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards of Lincoln's Inn in the county of Middlesex, esquire, and Francis Golding of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Cecilia his wife, in consideration of five shillings of lawful money of Great Britain to them in hand paid by the said David Edwards and Francis Golding at or before the ensealing and delivery of these presents, (the receipt whereof is hereby acknowleged,) and for other good causes and considerations them the said Abraham Barker and Cecilia his wife hereunto specially moving, **Have** bargained and sold, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, **All** that the capital messuage, called Dale Hall in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof: **To have and to hold** the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein-before mentioned or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances,

Parties. Considera-tion. Bargain and sale. Parcels. *Habendum.*

tenances, unto the ſaid David Edwards and Francis Golding, their executors, adminiſtrators, and aſſigns, from the day next before the day of the date of theſe preſents, for and during, and unto the full end and term of, one whole year from thence next enſuing and fully to be completed and ended: **Yielding** and paying therefore unto the ſaid Abraham Barker, and Cecilia his wife, and their heirs and aſſigns, the yearly rent of one pepper-corn at the expiration of the ſaid term, if the ſame ſhall be lawfully demanded: **To the intent** and purpoſe, that, by virtue of theſe preſents, and of the ſtatute for transferring uſes into poſſeſſion, the ſaid David Edwards and Francis Golding may be in the actual poſſeſſion of the premiſes, and be thereby enabled to take and accept a grant and releaſe of the freehold, reverſion, and inheritance of the ſame premiſes, and of every part and parcel thereof, to them, their heirs, and aſſigns; to the uſes and upon the truſts, thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. **In witneſs** whereof the parties to theſe preſents their hands and ſeals have ſubſcribed and ſet, the day and year firſt abovewritten.

N°. II. — *Reddendum.* — Intent. — Concluſion.

Sealed, and delivered, being firſt duly ſtamped, in the preſence of	Abraham Barker. (L. S.)
George Carter.	Cecilia Barker. (L. S.)
William Browne.	David Edwards. (L. S.)
	Francis Golding. (L. S.)

§. 2. *Deed* of Release.

This Indenture of five parts, made the fourth day of September, in the twenty-firſt year of the reign of our ſovereign lord George the ſecond by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and ſo forth, and in the year of our Lord one thouſand, ſeven hundred, and forty-ſeven, between Abraham Barker of Dale Hall in the county of Norfolk, eſquire, and Cecilia his wife, of the firſt part; David Edwards of Lincoln's Inn in the county of Middleſex, eſquire, executor of the laſt will and teſtament of Lewis Edwards of Cowbridge in the county of Glamorgan, gentleman, his late father, deceaſed, and Francis Golding of the city of Norwich, clerk, of the ſecond part; Charles Browne of Enſtone in the county of Oxford, gentleman, and Richard Moore of the city of Briſtol, merchant, of the third part; John Barker, eſquire, ſon and heir apparent of the ſaid Abraham Barker, of the fourth part; and Katherine Edwards, ſpinſter, one of the ſiſters of the ſaid David Edwards, of the fifth part. **Whereas** a marriage is intended, by the permiſſion of God, to be

Premiſes. — Parties.

N°. II. be ſhortly had and ſolemnized between the ſaid John Barker and Katherine Edwards: **Now this Indenture witneſſeth**, that in conſideration of the ſaid intended marriage, and of the ſum of five thouſand pounds, of good and lawful money of Great Britain, to the ſaid Abraham Barker, (by and with the conſent and agreement of the ſaid John Barker, and Katherine Edwards, teſtified by their being parties to, and their ſealing and delivery of, theſe preſents,) by the ſaid David Edwards in hand paid at or before the enſealing and delivery hereof, being the marriage portion of the ſaid Katherine Edwards, bequeathed to her by the laſt will and teſtament of the ſaid Lewis Edwards, her late father, deceaſed; the receipt and payment whereof the ſaid Abraham Barker doth hereby acknowlege, and thereof, and of every part and parcel thereof, they the ſaid Abraham Barker, John Barker, and Katherine Edwards, do, and each of them doth, releaſe, acquit, and diſcharge the ſaid David Edwards, his executors, and adminiſtrators, for ever by theſe preſents: and for providing a competent jointure and proviſion of maintenance for the ſaid Katherine Edwards, in caſe ſhe ſhall, after the ſaid intended marriage had, ſurvive and overlive the ſaid John Barker her intended huſband: and for ſettling and aſſuring the capital meſſuage, lands, tenements, and hereditaments, hereinafter mentioned, unto ſuch uſes, and upon ſuch truſts, as are hereinafter expreſſed and declared: and for and in conſideration of the ſum of five ſhillings of lawful money of Great Britain to the ſaid Abraham Barker and Cecilia his wife in hand paid by the ſaid David Edwards and Francis Golding, and of ten ſhillings of like lawful money to them alſo in hand paid by the ſaid Charles Browne and Richard More, at or before the enſealing and delivery hereof, (the ſeveral receips whereof are hereby reſpectively acknowleged,) they the ſaid Abraham Barker and Cecilia his wife, **Have**, and each of them hath, granted, bargained, ſold, releaſed, and confirmed, and by theſe preſents do, and each of them doth, grant, bargain, ſell, releaſe, and confirm unto the ſaid David Edwards and Francis Golding, their heirs and aſſigns, **All** that the capital meſſuage called Dale Hall, in the pariſh of Dale in the ſaid county of Norfolk, wherein the ſaid Abraham Barker and Cecilia his wife now dwell, and all thoſe their lands in the ſaid pariſh of Dale called or known by the name of Wilſon's farm, containing by eſtimation five hundred and forty acres, be the ſame more or leſs, together with all and ſingular houſes, dovehouſes, barns, buildings, ſtables, yards, gardens, orchards, lands, tenements, meadows, paſtures, feedings, commons, woods, underwoods, ways, waters, watercourſes, fiſhings, privileges, profits, eaſements, commodities, advantages, emoluments, hereditaments, and appurtenances whatſoever to the ſaid capital meſſuage and farm belonging or appertaining, or with the ſame uſed or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or

Recital. Conſideration.

Releaſe.

Parcels.

No. II.

or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made by the said Abraham Barker and Cecilia his wife for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession;) and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker, and Cecilia his wife, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises: **To have and to hold** the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein-before mentioned to be hereby granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns, to such uses, upon such trusts, and to and for such intents and purposes as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker, and Cecilia his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behoof of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but nevertheless to permit and suffer the said John Barker, and his assigns, during his life, to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit: and from and after the deceace of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can or may have or claim, of, in, to, or out of, all, and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance:

Mention of bargain and sale.

Habendum.

To the use of the grantors till marriage:

Then of the husband for life, *sans waste*:

Remainder to trustees to preserve contingent remainders:

Remainder to the wife for life, for her jointure, in bar of dower:

No. II.

Remainder to other trustees for a term, upon trusts after mentioned:

ance: and from and after the decease of the said Katherine Edwards, or other sooner determination of the said estate, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during, and unto the full end and term of, five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of waste: upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisoes and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same:

Remainder to the first and other sons of the marriage in tail:

and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, and of the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing;

Remainder to the daughters, as tenants in common, in tail:

and for default of such issue, then to the use and behoof of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, to be equally divided between them, (if more than one,) share and share alike, as tenants in common and not as joint-tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing:

Remainder to the husband in tail; Remainder to the husband's mother in fee.

and for default of such issue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully issuing: and for default of such heirs, then to the use and behoof of the said Cecilia, the wife of the said Abraham Barker, and of her heirs and assigns for ever.

The trust of the term declared;

And as to, for, and concerning the term of five hundred years herein before limited to the said Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes and agreements, hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, in case there shall be an eldest or only son and one or more other child or children of the said John Barker,

ker, on the body of the said Katherine his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child and children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the mean time and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions after the rate of four pounds in the hundred yearly. **Provided** always, that in case any of the same children shall happen to die before his, her, or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid. **Provided** also, that in case there shall be no such child or children of the said John Barker on the body of the said Katherine his intended wife begotten, besides an eldest or only son; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf afore-mentioned; or in case of the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid, or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and

No. II.

to raise portions for younger children,

payable at certain times,

with maintenance at the rate of 4 *per cent.*

and benefit of survivorship.

If no such child,

or if all die,

or if the portions be raised,

or paid,

or secured by the person next in remainder; the residue of the term to cease.

No. II.

Condition, that the uses and estates hereby granted shall be void, on settling other lands of equal value in recompense.

and purposes, any thing herein contained to the contrary thereof in any wise notwithstanding. **Provided** also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor, shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee-simple, in possession, in some convenient place or places within the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments and premises, hereby granted and released, and in lieu and recompense thereof, unto and for such and the like uses, intents, and purposes, and upon such and the like trusts, as the said capital messuage, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates herein before limited; expressed, and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia his wife, or the survivor of them, so settling, conveying, and assuring such other lands and tenements as aforesaid, and of his or her heirs and assigns for ever: and to and for no other use, intent, or purpose whatsoever; any thing herein contained to the contrary thereof in any wise notwithstanding. **And**, for the considerations aforesaid, and for barring all estates tail, and all remainders or reversions thereupon expectant or depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and the said Cecilia his wife, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do, and each of them doth, respectively covenant, promise, and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wife, and John Barker, shall and will, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, acknowlege and levy, before his majesty's justices of the court of common pleas at Westminster, one or more fine or fines, *sur cognizance de droit, come ceo, &c.* with proclamations according to

Covenant to levy a fine.

the form of the ſtatutes in that caſe made and provided, and the uſual courſe of fines in ſuch caſes accuſtomed, unto the ſaid David Edwards, and his heirs, of the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, by ſuch apt and convenient names, quantities, qualities, number of acres, and other deſcriptions to aſcertain the ſame, as ſhall be thought meet; which ſaid fine or fines, ſo as aforeſaid, or in any other manner levied and acknowleged, or to be levied and acknowleged, ſhall be and enure, and ſhall be adjudged, deemed, conſtrued, and taken, and ſo are and were meant and intended, to be and enure, and are hereby declared by all the ſaid parties to theſe preſents to be and enure, to the uſe and behoof of the ſaid David Edwards, and his heirs and aſſigns; to the intent and purpoſe that the ſaid David Edwards may, by virtue of the ſaid fine or fines ſo covenanted and agreed to be levied as aforeſaid, be and become perfect tenant of the freehold of the ſaid capital meſſuage, lands, tenements, hereditaments, and all other the premiſes, to the end that one or more good and perfect common recovery or recoveries may be thereof had and ſuffered, in ſuch manner as is hereinafter for that purpoſe mentioned. And it is hereby declared and agreed by and between all the ſaid parties to theſe preſents, that it ſhall and may be lawful to and for the ſaid Francis Golding, at the coſts and charges of the ſaid Abraham Barker, before the end of Michaelmas term next enſuing the date hereof, to ſue forth and proſecute out of his majeſty's high court of chancery one or more writ or writs of entry *ſur diſſeiſin en le poſt*, returnable before his majeſty's juſtices of the court of common pleas at Weſtminſter, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other deſcriptions, the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, againſt the ſaid David Edwards; to which ſaid writ, or writs, of entry he the ſaid David Edwards ſhall appear *gratis*, either in his own proper perſon, or by his attorney thereto lawfully authorized, and vouch over to warranty the ſaid Abraham Barker, and Cecilia his wife, and John Barker; who ſhall alſo *gratis* appear in their proper perſons, or by their attorney or attorneys, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the ſame court; who ſhall alſo appear, and after imparlance ſhall make default: ſo as judgment ſhall and may be thereupon had and given for the ſaid Francis Golding, to recover the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, againſt the ſaid David Edwards, and for him to recover in value againſt the ſaid Abraham Barker, and Cecilia his wife, and John Barker, and for them to recover in value againſt the ſaid common vouchee, and that execution ſhall and may be thereupon awarded and had accordingly, and all and every other act and thing be done and executed, needful and

in order to make a tenant to the *praecipe*, that a recovery may be ſuffered;

No. II. and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. And it is hereby further declared and agreed by and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine or fines, recovery and recoveries, conveyances, and assurances in the law whatsoever heretofore had, made, levied, suffered, or executed, or hereafter to be had, made, levied, suffered, or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by and between the said parties to these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and the recoveror or recoverors in the said recovery or recoveries named or to be named, and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes, limitations, and agreements, herein-before mentioned, expressed, and declared, of and concerning the same. And the said Abraham Barker, party hereunto, doth hereby for himself, his heirs, executors, and administrators, further covenant, promise, grant and agree, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and may at all times hereafter remain, continue, and be, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, herein-before mentioned, expressed and declared, of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust for him, her, them, or any of them; or from, by, or under his or her ancestors, or any of them; and shall so remain, continue, and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise, by the said Abraham Barker, or Cecilia his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and

Margin notes: to enure — to the preceding uses in this deed. — Other covenants; — for quiet enjoyment, — free from incumbrances;

No. II.

and indemnified of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker, or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their act, means, assent, consent, or procurement: And moreover that he the said Abraham Barker, and Cecilia his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges, of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements herein before mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law, shall be reasonably advised, devised, or required: so as such further assurances contain in them no further or other warranty or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties, who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. Provided lastly, and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker aud Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals, and attested by two or more credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby

and for further assurance.

Power of revocation.

N°. II. before limited and declared, or mentioned or intended to be limited and declared, of and in the capital meſſuage, lands, tenements, hereditaments, and premiſes aforeſaid, or of and in any part or parcel thereof, and to declare new and other uſes of the ſame, or of any part or parcel thereof, any thing herein contained to the contrary thereof in any wiſe notwithſtanding.

Concluſion. In witneſs whereof the parties to theſe preſents their hands and ſeals have ſubſcribed and ſet, the day and year firſt above written.

Sealed, and delivered, being firſt duly ſtamped, in the preſence of	Abraham Barker.	(L. S.)
George Carter.	Cecilia Barker.	(L. S.)
William Browne.	David Edwards.	(L. S.)
	Francis Golding.	(L. S.)
	Charles Browne.	(L. S.)
	Richard More.	(L. S.)
	John Barker.	(L. S.)
	Katherine Edwards.	(L. S.)

N°. III.

An Obligation, *or* Bond, *with* Condition *for the Payment of Money.*

KNOW all men by these presents, that I David Edwards of Lincoln's Inn in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker of Dale Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord George the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven.

The condition of this obligation is such, that if the abovebounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed, and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

David Edwards. (L. S.)

N°. IV.

A FINE *of Lands* sur Cognizance de Droit, come ceo, *&c.*

§. 1. *Writ of Covenant; or* PRAECIPE.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. **Command** Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices, at Westminster, from the day of St. Michael in one month, to shew wherefore they have not done it: and have you there the summoners, and this writ. **Witness** ourself at Westminster the ninth day of October, in the twenty-first year of our reign.

Sheriff's return.

Pledges of prosecution.	John Doe. Richard Roe.	Summoners of the within named Abraham, Cecilia, and John.	John Den. Richard Fen.

§. 2. *The Licence to agree.*

Norfolk, to wit. } **David Edwards**, esquire, gives to the lord the king ten marks, for licence to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale.

§. 3. *The Concord.*

And the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John, have acknowleged the aforesaid tenements,

ments, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted, for themselves and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling. N°. IV.

§. 4. *The Note, or Abstract.*

Norfolk, to wit. } **Between** David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them: to wit, that the said Abraham, Cecilia, and John, have acknowleged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves, and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§. 5. *The Foot, Chirograph, or Indentures of the* FINE.

Norfolk, to wit. } **This is the final agreement**, made in the court of the lord the king at Westminster, from the day saint Michael in one month, in the twenty-first year of the reign of the lord GEORGE the second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord the king then there present, between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Ce-

N°. IV. cilia his wife, and John Barker, efquire, deforciants, of two meffuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pafture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was fummoned between them in the faid court; to wit, that the aforefaid Abraham, Cecilia, and John, have acknowleged the aforefaid tenements, with the appurtenances, to be the right of him the faid David, as thofe which the faid David hath of the gift of the aforefaid Abraham, Cecilia, and John; and thofe they have remifed and quitted claim, from them and their heirs, to the aforefaid David and his heirs for ever. And further, the fame Abraham, Cecilia, and John, have granted for themfelves and their heirs, that they will warrant to the aforefaid David and his heirs, the aforefaid tenements, with the appurtenances, againft all men for ever. And for this recognition, remife, quit-claim, warranty, fine, and agreement, the faid David hath given to the faid Abraham, Cecilia, and John, two hundred pounds fterling.

§. 6. *Proclamations, endorfed upon the* FINE, *according to the Statutes.*

The firft proclamation was made the fixteenth day of November, in the term of faint Michael, in the twenty-firft year of the king withinwritten.

The fecond proclamation was made the fourth day of February, in the term of faint Hilary, in the twenty-firft year of the king withinwritten.

The third proclamation was made the thirteenth day of May, in the term of Eafter, in the twenty-firft year of the king withinwritten.

The fourth proclamation was made the twenty-eight day of June, in the term of the holy Trinity, in the twenty-fecond year of the king withinwritten.

N°. V.

N°. V.

A common RECOVERY *of Lands with* * *double Voucher.*

§. 1. *Writ of Entry* sur Disseisin *in the* Post; or PRAECIPE.

George the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. **Command** David Edwards, esquire, that justly and without delay he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of saint Martin, to shew wherefore he hath not done it: and have you there the summoners, and this writ. **Witness** ourself at Westminster, the twenty-ninth day of October, in the twenty-first year of our reign.

Pledges of prosecution. } John Doe. Richard Roe. Summoners of the withinnamed David. { John Den. Richard Fen. Sheriff's return.

§. 2. *Exemplification of the* RECOVERY *Roll.*

George the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to all to whom these our present letters shall come, greeting. **Know ye**, that among the pleas of land enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of saint Michael, in the twenty-first year of our reign, upon the fifty-second roll it is thus contained. **Entry** returnable on the octave of saint Mar- Return.

* Note, that if the recovery be had with single voucher, the parts marked "thus" in §. 2. are omitted.

No. V. tin. Norfolk, to wit: Francis Golding, clerk, in his proper person demandeth against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [* of six shillings and eight pence, and more, in rents, corn, and grass:] and into which [the said David hath not entry, unless as aforesaid:] and thereupon he bringeth suit, [and good proof]. And the said David in his proper person comes and defendeth his right, when [and where it shall behove him,] and thereupon voucheth to warranty "John Barker, esquire; who is at present here in court in his "proper person, and the tenements aforesaid with the appurte- "nances to him freely warranteth, [and prays that the said "Francis may count against him]. And hereupon the said "Francis demandeth against the said John, tenant by his own "warranty, the tenements aforesaid with the appurtenances, in "form aforesaid, &c. And whereupon he saith, that he him- "self was seised of the tenements aforesaid with the appurte- "nances, in his demesne as of fee and right, in time of peace, "in the time of the lord the king that now is, by taking the "profits thereof to the value, &c. And into which, &c. And "thereupon he bringeth suit, &c. And the aforesaid John, te- "nant by his own warranty, defends his right, when, &c. and "thereupon he further voucheth to warranty" Jacob Morland; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warranteth, &c. And hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c. And the aforesaid Jacob, tenant by his own warranty, defends his right, when, &c. And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth sup-

Margin notes: Demand against the tenant. — Count. — Esples. — Defence of the tenant. — Voucher. — "Warranty. — "Demand "against the "vouchee. — "Count. — "Defence "of the "vouchee. — "Second "voucher. — Warranty. — Demand against the common vouchee. — Count. — Defence of the common vouchee. — Plea, *nul disseisin.*

* The clauses, between hooks, are no otherwise expressed in the record than by an &c.

pofe: and of this he puts himfelf upon the country. **And** the aforefaid Francis thereupon craveth leave to imparl; and he hath it. And afterwards the aforefaid Francis cometh again here into court in this fame term in his proper perfon, and the aforefaid Jacob, though folemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. **Therefore it is confidered**, that the aforefaid Francis do recover his feifin againft the aforefaid David of the tenements aforefaid, with the appurtenances: and that the faid David have of the land of the aforefaid " John, to the value [of the tenements aforefaid;] " and further, that the faid John, have of the land of the faid" Jacob to the value [of the tenements aforefaid.] And the faid Jacob in mercy. **And** hereupon the faid Francis prays a writ of the lord the king, to be directed to the fheriff of the county aforefaid, to caufe him to have full feifin of the tenements aforefaid with the appurtenances: and it is granted unto him, returnable here without delay. Afterwards, that is to fay, the twenty-eighth day of November in this fame term, here cometh the faid Francis in his proper perfon; and the fheriff, namely fir Charles Thompfon, knight, now fendeth, that he by virtue of the writ aforefaid to him directed, on the twenty-fourth day of the fame month, did caufe the faid Francis to have full feifin of the tenements aforefaid with the appurtenances, as he was commanded. **All and fingular** which premifes, at the requeft of the faid Francis, by the tenor of thefe prefents we have held good to be exemplified. In teftimony whereof we have caufed our feal, appointed for fealing writs in the bench aforefaid, to be affixed to thefe prefents. **Witnefs** fir John Willes, knight, at Weftminfter, the twenty-eighth day of November, in the twenty-firft year of our reign.

Cooke.

N°. V.

Imparlance.

Default of the common vouchee.

Judgment for the demandant.

Recovery in value.

Amercement.

Award of the writ of feifin, and return.

Exemplification continued.

Tefte.

THE END OF THE SECOND VOLUME.

ERRATA.

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Page 25.	note 7.	line 2.	*for* former *read* farmer.
159.	— 2.	— 5.	*after* equity *read* of.
205.	— 3.	— 6.	*for* How *read* For.
418.	— 9.	— 53.	*for* Gamkeeper *read* Gamekeeper.
419.	— 11.	— 3.	*for* posidentis *read* possidentis.

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